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No. 70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ARNOLD HOLTZMAN AS *AMICUS CURIAE*

STUART M. SPEISER
Counsel for amicus curiae
Arnold Holtzman
200 Park Avenue
New York, N. Y. 10017

CHARLES F. KRAUSE
ALFRED W. GANS
DONALD W. MADOLE
SPEISER, SHUMATE, GEOGHAN & KRAUSE
Of Counsel

January 18, 1968

TABLE OF CONTENTS

PAGE

Nature of the Interest of *Amicus* Arnold Holtzman 1

The Questions Involved 4

ARGUMENT—

I. The Second Circuit Considered All of the Legal Arguments Now Being Advanced on Behalf of Petitioner Alitalia, and Rejected All of Them for Sound Legal Reasons 5

II. Claims in Briefs of Other *Amici* That the Decision Below Compromises the Good Faith of the United States in Relations With Other Nations, and May Lead to Erosion of the Warsaw Convention, Are Entirely Unfounded. The Warsaw Convention Has Outlived Its Time Only Because of Misrepresentation of Its True Nature. There Is No Legal, Moral or Economic Justification for Warsaw Today. The Arguments Made Herein Against the Decision Below Tacitly Admit That Warsaw Cannot Survive if Reasonable Notice of Its Limitations Is Required 10

a. There Is Absolutely No Economic Justification Today for Warsaw Limitations. Total Passenger and Cargo Liability Insurance Costs for U.S. Airlines Are Less Than One Percent (1%) of Operating Costs, With or Without Warsaw Limitations. The Other 99% of Operating Costs Are Not Limited by Treaty, and Are Readily Paid, Often at American Prices, by Foreign Airlines Eager to Serve the Lush U.S. Air Travel Market. The C.A.B. Has Found That the Impact of Complete Denunciation of Warsaw Would Be Minimal 12

PAGE

b. The Warsaw Convention Confers No Benefits Upon Passengers—It Merely Takes Away Legal Rights They Would Otherwise Have. Its Sole Purpose Was to Limit Carrier Liability. All Ticketing and Documentation Procedures Developed Through Warsaw Are Also Available to Non-Warsaw Signatories Through I.A.T.A. 16

c. Warsaw Does Not Reduce Litigation or Bring Uniformity of Law. By Injecting the Irritants of Arbitrary Limitations and Foreign Legal Concepts Into Normal Litigation Channels, It Actually Foments Protracted Litigation and Destroys Uniformity 19

d. Carriers and Insurers Who Claim That Warsaw's Liability Limitations Are Necessary, Use American Courts to Litigate Huge Hull Claims Which Dwarf Passenger Suits, and Which Are Not Limited by Any Treaty 21

e. Warsaw Is Admitted by Its Strongest Proponents to Be "Completely Repugnant" to American Law. The Only Reported Decision Upholding Its Constitutionality Under the Seventh Amendment Rests on the Untenable Ground that the Right to Trial by Jury Does Not Include Assessment of Damages 23

f. U.S. Adherence to Warsaw Has No Effect on Operating Rights to Foreign Countries 25

PAGE

g. Anachronistic Limitations on Wrongful Death Recoveries in a Few American States, Cited as a Parallel to Warsaw, Are on the Way Out; Are Being Circumvented in Many Aviation Cases; Are Subject to State Legislative Control; and in Any Event Cannot and Do Not Apply to Personal Injury Cases Such as *Lisi* 26

III. The *Amici* United Kingdom, Italy and Canada Are Owners or Controllers of International Air Carriers. Their Position on the Warsaw Convention Should Be Considered in That Light .. 28

a. In General 28

b. The Republic of Italy 30

c. The United Kingdom 34

d. Canada 46

e. ATA and IATA, the Air Transport Trade Associations 50

IV. Every Expression of United States Policy on the Warsaw Convention Has Clearly Stated That if the Carriers Do Not Give Passengers Adequate Notice of Warsaw Limitations, the Carrier Must Suffer Loss of the Liability Limitation. Since the United States Has Steadfastly Maintained That Passenger Notice Is Essential to Warsaw Limitation of Liability, It Cannot Be Claimed That the Decision Below Causes Surprise or Any Breach of International Understanding 56

PAGE

a. In General 56

b. U.S. Policy Statements at Rio 56

c. At the Hague 57

d. United States Governmental Policies and Statements of Position, 1962-1963 61

e. At Montreal Special Meeting of ICAO in 1966 66

f. In 1966 and 1967, Following Purported Withdrawal of the Denunciation of Warsaw in May 1966 73

g. American Public Policy on Carrier Liability Limitations 84

V. In Addition to the United States, Other Participating Governments at Warsaw, Rio and The Hague Evinced Concern for the Passenger. They Noted the Inequality of Bargaining Positions of Airlines and Passengers; Noted the "Adhesion" Nature of the Contract of Carriage; and Supported the Principle That Airlines Would Lose Their Liability Limitation if They Did Not Give Notice to the Passenger 88

a. At Warsaw 88

b. At Rio 94

c. At the Hague 96

VI. The Position of Air Carriers Has Completely Changed Since the Fledgling Days of 1929, and the Warsaw Convention Must Be Considered in Light of Modern Prevailing Conditions 100

PAGE

a. The Radical Changes Since 1929 100

b. The Warsaw Convention Must Be Construed as a Whole in the Light of Presently Existing Conditions of International Air Travel .. 104

VII. The Original Greek Proposal Relating to the Sanctions in Article 3 of Warsaw, Does Not Support Petitioner's Position, Since It Did Not Relate to Limitation of Liability and Would Not Have Eliminated the Sanctions 114

CONCLUSION 121

Certificate of Service 122

APPENDIX A 1a

TABLE OF AUTHORITIES:

Cases:

	PAGE
Berner v. United Airlines, et al., 149 N.Y.S. 2d 335	17
Block et al. v. Compagnie Nationale Air France (Nov. 8, 1967), —— F 2d ——, 1967 CCH Neg. Cases, p. 2307	20, 120
Boryk v. Aerolineas Argentina, et al., U. S. D. C., Southern District, New York, 62 Civil 3855	4
Braniff Airways, Inc. v. Curtiss-Wright Corp., U.S. District Court, Southern District of New York, several preliminary phases of which are unofficially reported at 7 Avi. 18,114 and 8 Avi. 18,255 (CCH Aviation cases)	22
Byzinski v. Eastern Air Lines, et al., Supreme Court, County of New York, Index No. 6747/65	3
Coster v. Coster (1943), 289 NY 438, 46 NE2d 509, 146 ALR 702	18
DeSoto Motor Corp. v. Stewart, 62 F.2d 914	26
Dimick v. Schiedt (1935), 293 U.S. 474, at p. 486, 79 Led 603, 611 S Ct 296, 95 ALR 1150	25
Dougherty v. American McKenna Process Co. (1912), 255 Ill. 369, 99 NE 619, LRA 1915 F 955, Ann Cas 1913 D 568	18
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Eck v. United Arab Airlines (1966, CA 2), 360 F2d 804	6
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PAGE

Geofroy v. Riggs, 133 U.S. 258 ..... 25, 112
Graham v. Eastern Air Lines, et al., Supreme Court, County of New York, Index No. 9718/65 3

Hamilton v. Erie R. Co. (1916), 219 NY 343 at p. 353, 114 NE 399, writ of error dism in 248 US 369, 63 L ed 307, 39 S Ct 95 112
Harrison v. Eastern Air Lines, et al., Supreme Court, County of New York, Index No. 9723/65 3
Hartford Accident & Indemnity Co. v. Delta & Pine Land Co. (1934), 292 US 143, 78 L ed 1178, 54 S Ct 634, 92 ALR 928, rehearing denied in 292 US 607, 78 L ed 1468, 54 S Ct 772 18

Kilberg v. Northeast Airlines, Inc. (1961), 9 NY2d 34, 211 NYS2d 133, 172 NE2d 526 ..... 17, 27

Loughran v. Loughran (1934), 292 US 216, 78 L ed 1219 54 S Ct 684, rehearing denied in 292 US 615, 78 L ed 1474, 54 S Ct 861 18
Love v. Pakistan Air Lines, U. S. D. C., Southern District, New York, 65 Civil 2369 4

Masci v. Young (1932), 109 NJL 453, 162 A 623, 83 ALR 869, affirmed in Young v. Masci (1933), 289 US 253, 77 L ed 1158, 53 S Ct 599, 88 ALR 170 18
Massenburg v. Eastern Air Lines, et al., U. S. D. C., Eastern Air Lines, et al., U. S. D. C., Eastern District, New York, 65 A. 640 4
Mertens v. Flying Tiger Line, Inc. (1965, CA2), 341 F2d 851, cert den 382 U.S. 816 6
Muller v. Oregon, 208 US 412, 52 L ed 551, 28 S Ct 324 28

PAGE

Nat. Bank v. Shaw, 109 Tenn 237 18
Noel v. Linea Aeropostal Venezolana, 247 F.2d 667 16

Oceanic Steam Nav. Co. v. Corcoran (1925, CA2 NY), F2d 163, 57 ALR 163, at page 168 86

Pearson v. Northeast Airlines, Inc. (1962, CA2 NY), 309 F2d 553, 92 ALR2d 1162, certiorari denied in (1958) 372 U.S. 912, 9 L ed 720, 83 S Ct 726.....18, 27
Pierre v. Eastern Airlines, et al. (1957), 152 F.Supp. 486, U.S. District Court for the District of New Jersey 24
Poff v. New England T & T Co., 72 N.H. 164, 55 Atl. 891 26
Powell v. Eastern Air Lines, et al., U. S. D. C., Eastern District, New York, 66 A. 101 4

Reiger v. Pan American, et al., Supreme Court, County of New York, Index No. 13252/66 3
Rygaard v. Eastern Air Lines, et al., Supreme Court, County of New York, Index No. 9722/65 3

Smyth Sales v. Petroleum Heat & Power Co. (1944, CA 3), 141 F.2d 41 at p. 44 25
Sommers v. Eastern Air Lies, et al., Supreme Court, County of New York, Index No. 9720/65 4
Sullivan v. Kidd (1920), 254 US 433 at p. 439, 65 L ed 344, at p. 347, 41 S Ct 158 .....112, 113

Universal Adjustment Corp. v. Midland Bank, Ltd. (1933), 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407, p. 1422 8
Usher v. West Jersey R. Co., 126 Pa 206 18

PAGE

Volney Righter, etc. v. American Air Lines, et al., Supreme Court, County of New York, Index No. 11487/64 3

Warren v. Flying Tiger Line, Inc. (1965, CA9), 352 F2d 494 6

Westminster Bank v. Imperial Airways, Limited, United King's Bench Division: [1936] 2 All E.R. 890; 155 L.T. 86, 52 T.L.R. 607; 80 Sol.Jo. 794; 42 Com.Cas. 1; 55 Lloyd, L.R. 242; (1936), U.S.Av.R. 39 43

Winsor v. United Air Lines, 153 F.Supp. 244 17

Zuckerman v. Eastern Air Lines, et al., Supreme Court, County of New York, Index No. 9721/65 3

Statutes:

Canadian Transport Act of 1938 87

Death on the High Seas Act 27

Dominion Transport Act 88

Federal Employers Liability Act 27

Federal Tort Claims Act 27

Railway and Canal Traffic Act, 1854 88

Other Authorities:

Appendix of U.S. Senate Hearings on the Insurance Industry, Sen. Res. 231, 85th Cong., Aug. 6-15, 1958, at pp. 487-675 23

7 New York Jur, CARRIERS, §§399 et seq. 84

11 Am Jur, Conflict of Laws, §6 18

PAGE

13 CJS, CARRIERS, §§629 et seq. 84

14 Am Jur 2d, CARRIERS, §§942 et seq. 84

80 CJS, SHIPPING, §195a 84

[1942] US Av 178 87

[1947] US Av 1 88

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IGIA document 23/1.10A, Final Action, August 7, 1962, Attachment D, page 1 12
page 8 18
page 9 19

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Second International Conference of Private Air Law, Warsaw Oct. 4-12, 1928 "Warsaw Minutes" 29, 30, 31, 32, 88, 89, 92, 114

PAGE

Special ICAO Meeting at Montreal, February 1-15, 1966, ICAO Document 8384-LC/154-1 "Montreal Minutes" 30, 34, 50, 54, 66, 69, 70, 71, 103, 104

Speiser, Recovery For Wrongful Death (1966), ...26, 27

The United States and the Warsaw Convention, Lowenfeld and Mendelsohn, 80 Harvard Law Rev 100, 101

Volume II Hague Conference, 1955 ICAO Document 7687-LC/140 "Hague Documents" 29, 54

Warsaw Convention .....1 et passim

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BRIEF OF ARNOLD HOLTZMAN AS *AMICUS CURIAE*

Nature of the Interest of *Amicus* Arnold Holtzman

Amicus Arnold Holtzman's motion for leave to file this brief *amicus curiae* was granted by this Court, on the grounds that he now has pending an action for damages in the Supreme Court of New York, County of Kings, entitled "ARNOLD HOLTZMAN, Plaintiff —v— BRITISH EUROPEAN AIRWAYS and DE HAVILLAND, Defendants," being Index No. 7840/1963 on the Docket of said Court, in which the question involved is the same as that presented for decision in the instant case, namely—are the limitation of liability provisions contained in Article 22(1) of the Warsaw Convention (49 Stat. 3000-3026), available to an air carrier of a passenger receiving bodily injuries on a flight in international transportation in light of the provisions of Article 3(2) of the Convention (49 Stat. 3015) precluding

availability of various provisions of the Convention limiting liability where the purported ticket contains, on the front thereof in exceedingly small print, the message, "Each passenger should carefully examine this ticket, particularly the Conditions on page 4," and the "notice" to the passengers is located on page 4 of a ticket and baggage checks combined in the form of a small booklet and (to quote the two courts below), is contained in footnotes printed "in microscopic type" and "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' ", and the "exculpatory statements . . . are virtually invisible . . . are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else," and " 'are so artfully camouflaged that their presence is concealed' "? *Amicus* Holtzman states that the ticket "delivered" to him by British European Airways, on the international flight on which he sustained severe and permanent bodily injuries, is identical, as to its pertinent parts, printing, typography and legibility, to the ticket delivered to the respondents in the instant case.

More specifically, *amicus* Holtzman was a passenger on a de Havilland aircraft operated by British European Airways which crashed and burned at Ankara, Turkey, on December 21, 1961. *Amicus* Holtzman was trapped in the flames, and according to paragraph 6(a) of the verified bill of particulars which he filed in said action,

> "As a result of the accident plaintiff Arnold Holtzman suffered pulmonary burns necessitating an emergency tracheotomy; plaintiff suffered burns covering an area of 20% of the total body area including the following: third degree burns involving the entire forehead and eyebrows, extending into the eyelids, downward around the upper part of the left cheek and across the glabellar region of the nose. The lower

portions of the nose, upper lip, lower lip, cheek and naterior portions of the neck were deeply burned. Scattered areas of third degree loss in the area of the ears involving the helical rims of the ears causing a loss of a portion of the area involved. Second degree burns in the scalp. Deep and extensive third degree burns of both hands. Said burns resulted in many operative procedures to repair and reconstruct the destroyed areas of skin of the face, forehead, ears and hands. The permanent injuries are the results of the healing scars and the attempts at reconstruction which have resulted in permanent disfigurement of the plaintiff."

An additional ground of the motion of *amicus* Holtzman for leave to file this brief was that there are many other cases, now pending in various state and federal courts, involving identical tickets "delivered" to passengers who were killed or suffered severe bodily injury in international flight air crashes or accidents, in which the Warsaw Convention is being attempted to be used as a defense, among them being the following captioned cases in which the plaintiffs are represented by *amicus* Holtzman's counsel Stuart M. Speiser: *Volney Righter, etc.* v. *American Air Lines, et al.*, Supreme Court, County of New York, Index No. 11487/64; *Reiger* v. *Pan American, et al.*, Supreme Court, County of New York, Index No. 13252/66; *Byzinski* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 6747/65; *Rygaard* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 9722/65; *Harrison* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 9723/65; *Graham* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 9718/65; *Zuckerman* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index

No. 9721/65; *Sommers* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 9720/65; *Boryk* v. *Aerolineas Argentina, et al.*, U. S. D. C., Southern District, New York, 62 Civil 3855; *Eck* v. *United Arab Airlines*, Supreme Court, County of New York, Index No. 7778/63; *Eck* v. *United Arab Airlines*, U. S. D. C., Southern District, New York, 64 Civil 3855; *Love* v. *Pakistan Air Lines*, U. S. D. C., Southern District, New York, 65 Civil 2369; *Massenburg* v. *Eastern Air Lines, et al.*, U. S. D. C., Eastern District, New York, 65 A. 640 and *Powell* v. *Eastern Air Lines, et al.*, U. S. D. C., Eastern District, New York, 66 A. 101.

Amicus Holtzman further stated in his motion for leave to file this brief, that he has attempted to present his views to this Court, by and through his present counsel, as to the invalidity of the purported "withdrawal" of the Government of the United States of its earlier denunciation of the Warsaw Convention, in the case of Arnold Holtzman, Petitioner, v. Dean Rusk, Secretary of State, Respondent, Case No. 1294 on the Docket of this Court for the October, 1965, Term; petition for writ of certiorari was denied May 16, 1966, reported in 384 U. S. 943, 16 L. ed. 2d 541, 86 Sup. Ct. 1466.

Amicus Holtzman supports the position of the respondents herein, and respectfully urges this Honorable Court to affirm the decisions of the courts below.

The Question Involved

Is the liability of an air carrier to a passenger limited to $8,291,87 under the Warsaw Convention, when the only ticket reference to the possible applicability of the Warsaw Convention is the following: a message on the front of a ticket, in exceedingly small print, stating "Each passenger

should carefully examine this ticket, particularly the Conditions on page 4"; and, on said page 4, contained in footnotes printed in microscopic type and camouflaged in Lilliputian print in a thicket of "Conditions of Contract," the exculpatory statements are virtually invisible, are ineffectively positioned, diminutively sized, unemphasized by bold face type, contrasting color or anything else, and are so artfully camouflaged that their presence is concealed?

ARGUMENT

I.

The Second Circuit Considered All of the Legal Arguments Now Being Advanced on Behalf of Petitioner Alitalia, and Rejected All of Them for Sound Legal Reasons.

The carefully considered opinion of the Second Circuit makes it clear that all legal arguments contained in the briefs submitted in support of petitioner Alitalia in this Court have already been rejected, for sound legal reasons. Therefore, *amicus* Holtzman will make only brief mention of these legal arguments herein, so as not to duplicate the brief of respondent Lisi. The main thrust of this Holtzman *amicus* brief will be directed against non-legal arguments and innuendos raised by the briefs of other *amici*, as detailed in Point II below.

The Court of Appeals specifically rejected Alitalia's contention that, under Article 3(2), all that was required was that a ticket be delivered to passengers, the rejected argument being based upon a strict literal construction of the Convention and a sought-for application of the principle *expressio unius est exclusio alterius* (Appendix, pp. 93a, 94a). The Court below rejoined (Appendix, p. 94A):

"It is apparent that Alitalia relies on a literal reading of the Convention for its assertions. We reject the interpretation it urges upon us. While it is true that the language of the Convention is relevant to our decision, it must not become, as Justice Frankfurter stated it, a 'verbal prison.' *Sullivan* v. *Behimer*, 363 U.S. 335, 358 (1960) (Frankfurter, *J.*, dissenting). The task of ascertaining the meaning of words is difficult, and one certain way of misinterpreting them is by a literal reading. As Learned Hand put it, 'words are such temperamental beings that the surest way to lose their essence is to take them at their face.' 1942 Address by Judge Hand to the Massachusetts Bar Association. Thus, the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles and the overall purposes of the Convention. See *Eck* v. *United Arab Airlines, supra.*"

The reference to the *Eck* case is to the same court's opinion in *Eck* v. *United Arab Airlines* (1966, CA2), 360 F2d 804. The Court further fortified its rejection of this medieval rigidity by references to its own earlier opinion in *Mertens v. Flying Tiger Line, Inc.* (1965, CA2), 341 F2d 851, cert den 382 U.S. 816, and to that of the Ninth Circuit in *Warren* v. *Flying Tiger Line, Inc.* (1965, CA9), 352 F2d 494, (Appendix pp. 94a, 95a), pointedly adding (Appendix, pp. 96a, 97a):

"We believe that the reasoning of the *Mertens* and *Warren* decisions is apposite to the case now before us. The Convention's arbitrary limitations on liability —which have been severely and repeatedly criticized —are advantageous to the carrier. But the *quid pro quo* for this one-sided-advantage is delivery to the passenger of a ticket and baggage check which give him

notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit.

This notice to passengers is especially important in this country where the overwhelming number of people who travel by air do so on domestic flights, for which the Convention's restrictions on liability are inapplicable. It is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have frequently traveled domestically, the amount they may recover in the event of an accident is drastically reduced. In short, it is clear from the *ratio decidendi* of the *Mertens* and *Warren* cases, that the inquiry that must be made if the Convention's Articles are to be given meaning, is 'whether the ticket was delivered to the passenger in such a manner as to afford him a reasonable opportunity to take self-protective measures. . . .' *Mertens* v. *Flying Tiger Line, Inc., supra* at 857."

The very recent *Egan* case from the New York Court of Appeals, a fully considered unanimous decision discussed in detail below, Point VI, completely adopts and supports the position of the Second Circuit. The reasoning and conclusion are also consistent with previous decisions of this Court supporting the proposition that if alternative meanings can be placed upon a treaty, the meaning should be adopted, if possible, that is least restrictive of the rights of individuals. As the Supreme Judicial Court of Massachusetts said in *Universal Adjustment Corp.* v. *Midland Bank, Ltd.* (1933), 281 Mass. 303, 184 N.E. 152, 87 A.L.R.

1407, at page 1422: "When a treaty provision admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred. *Akasura* v. *Seattle*, 265 U.S. 332, 44 S. Ct. 515, 68 L. ed. 1041; *Tucker* v. *Alexandroff* [183 U.S. 424, 437, 22 S. Ct. 195, 46 L. ed. 264], *supra*; *Geofroy* v. *Riggs* [133 U.S. 258, 271, 10 S. Ct. 295, 33 L. ed. 642], *supra*."

As to whether the particular tickets (and baggage checks) here involved gave adequate notice, the Court found them completely wanting (Appendix, page 98a):

> "We proceed to determine, therefore, whether the particular tickets and baggage checks involved in the present case gave the appellees adequate notice. On the front of the ticket and baggage check, in exceedingly small print, was the following message: 'Each passenger should carefully examine this ticket, particularly the Conditions on page 4.' And, at this point, we note that one of our reasons in *Mertens* v. *Flying Tiger Line, Inc.*, *supra*, for precluding the carrier from limiting its liability under the Convention was that the required statement on the ticket 'was printed in such a manner as to virtually be unnoticeable and unreadable . . .' *Id.* at 857.
>
> Judge MacMahon appropriately characterized the 'notice' to the passenger in his pithy conclusion as 'camouflaged in Lilliputian print in a thicket of "Conditions of Contract." . . . Indeed the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that their presence is concealed.'"

The petitioner Alitalia makes the belated after-thought plea that the question was one for a jury. Both courts below, the trial court (Appendix, page 76a), and the Court of Appeals (Appendix, page 100a) specifically held that a jury could not have reasonably found that the tickets and baggage checks gave the passengers the required notice. When respondents moved for partial summary judgment, petitioner submitted affidavits in opposition (Appendix, pages 72a, 73a) and "All the evidentiary facts material to the motion appear on the face of the tickets issued to the passengers on the flight involved, and there is no dispute about them" (Appendix, page 73a). Furthermore, counsel for *amicus* Holtzman was present at the argument of these cases on appeal before the Second Circuit, and heard Judge Kaufman ask George Tompkins, Esquire, counsel for petitioner Alitalia, from the Bench during the oral argument whether petitioner Alitalia claimed that there was any jury issue; and Mr. Tompkins answered in the negative. And the *Egan* case, discussed below, Point VI, shows that no factual or jury issue is here involved since reasonable men could not possibly differ on the question.

Virtually all counsel supporting the position of petitioner Alitalia have made a reference to the last part of a sentence in footnote 64 on page 512 of an article in 80 Harvard Law Review, by two attorneys employed in 1966 by the United States Department of State, Andreas F. Lowenfeld and Allan F. Mendelsohn. But as the authors pointedly remarked in an asterisk footnote on page 497 of this article, "The views expressed herein are those of the authors and not necessarily those of the United States Government or the Department of State." The part of the footnote sentence repeated by opposing counsel states, without any citation of *any* precedents to support the re-

mark, that the trial judge herein, in *Lisi*, "was breaking a chain of hundreds of precedents". Those same opposing briefs, however, fail to state the *text* on page 512 to which the footnote 64 was appended, appearing on pages 512, 513 of the article—"As to notice, it was hard to get away from the airlines' standard form * * * [referring to form of ticket on a facing page]. Even if the passenger could read the ticket, he would hunt in vain for warning of the liability limit. The United States Government had sought at the Hague to have the warning made more specific and in letters at least one-half centimeter higher, but these efforts had failed." Furthermore, neither the authors of the Harvard article nor the briefs supporting petitioner herein have pointed out where one may find a list of these hundreds of precedents, nor the citations of any of them.

II.

Claims in Briefs of Other *Amici* That the Decision Below Compromises the Good Faith of the United States in Relations With Other Nations, and May Lead to Erosion of the Warsaw Convention, Are Entirely Unfounded. The Warsaw Convention Has Outlived Its Time Only Because of Misrepresentation of Its True Nature. There Is No Legal, Moral or Economic Justification for Warsaw Today. The Arguments Made Herein Against the Decision Below Tacitly Admit That Warsaw Cannot Survive if Reasonable Notice of Its Limitations Is Required.

Shortly after the end of World War II, it became apparent that international airlines no longer needed the extraordinary subsidy involved in limiting passenger liability to $8,300, and that the United States, whose citizens make up the great majority of the victims, would not stand for it

much longer. There then began a series of conferences and considerations of the Warsaw Convention problem, which are described in more detail in Points III, IV and V below. Throughout these conferences, the true purposes and nature of Warsaw have been misrepresented consistently by its proponents, and therefore it is no surprise to see this misrepresentation continued right into the *amici* briefs supporting petitioner in this case. The purpose of this Point II is to deal directly with these misrepresentations, and to point out the true nature and purposes of Warsaw.

Warsaw's proponents have attempted to prolong its life by making vague claims that its limited liability is an economic necessity; that it confers benefits upon passengers; that it brings about uniformity and lessens litigation; and that it contains important provisions and has important purposes other than the limitation of carrier's liability, such as a uniform ticketing regime which would not be possible without the Convention. These claims are discussed below in the remaining sections of this Point II, against the background of the same old vague claims and innuendos, such as the statement on page 10 of the brief of *amicus* United Kingdom, that "a decision of this Court upholding the judgments below would imperil the limitation provisions of the Montreal agreement"; and the claimed "effect of the decision below in compromising the good faith and integrity of the United States in its relations with other nations" found at page 8 of the first brief submitted by *amicus* A.T.A. (attached to its motion of March 31, 1967 for leave to file brief amicus curiae on the petition for certiorari). As will be apparent after reading the material below, the true gravamen of the aforementioned claim of *amicus* United Kingdom is that Warsaw is so unfair and anachronistic that the mere requirement of reasonable notice of its provisions is enough to imperil its existence.

a. ***There Is Absolutely No Economic Justification Today for Warsaw Limitations. Total Passenger and Cargo Liability Insurance Costs for U.S. Airlines Are Less Than One Percent (1%) of Operating Costs, With or Without Warsaw Limitations. The Other 99% of Operating Costs Are Not Limited by Treaty, and Are Readily Paid, Often at American Prices, by Foreign Airlines Eager to Serve the Lush U.S. Air Travel Market. The C.A.B. Has Found That the Impact of Complete Denunciation of Warsaw Would Be Minimal.***

For several decades, proponents of Warsaw have claimed that elimination of the liability limitation would cause financial havoc among international airlines. *No figures of any kind were ever presented in support of this claim.* To this date, the foreign airlines, such as those operated by *amici* U.K., Italy and Canada, have never submitted any supporting figures, even though such figures have been requested by various organizations officially concerned with the Warsaw problem.

Finally, as part of a general review of Warsaw conducted by the U.S. Interagency Group on International Aviation (IGIA) in 1962, the Civil Aeronautics Board undertook a staff study to determine the economic impact of complete denunciation of Warsaw, and to study various other alternatives. The C.A.B. staff reached the conclusion that "*The increase in insurance cost to the carriers, in the event they are subjected to unlimited liability as a result of U.S. withdrawal from the Warsaw Convention, would be minimal*" (IGIA document 23/1.10A, Final Action, August 7, 1962, Attachment D, page 1).

This conclusion is amply supported by reference to the most recent figures which counsel for *amicus* Holtzman has been able to find in the public files of the C.A.B. Set forth below are excerpts from C.A.B. Forms 41 required to be

filed with the C.A.B. by U.S. air carriers for the year ending December 31, 1966, of which *amicus* Holtzman respectfully requests this Court to take judicial notice. These figures show total operating expenses, insurance costs and passenger-cargo liability insurance cost as a percentage of total operating expenses, for the two largest all-domestic air carriers (United Airlines and American Airlines), and various divisions of the largest all-international air carrier (Pan American World Airways). Column A shows total operating expenses; column B shows cost of purchased public liability and property damage and all other general insurance except insurance covering liability for injuries, loss and damage to passengers and cargo, combined with provision for self-insurance against general risks (generalized as "non-passenger insurance"); column C shows cost of purchased insurance and provisions for self-insurance covering liability for injuries, loss and damage to passengers and cargo (generalized as "passenger-cargo insurance"); and column D shows passenger-cargo insurance as a percentage of total operating expenses.

Carrier	A Total operating expenses	B Cost of non-passenger insurance	C Cost of passenger-cargo insurance	D Passenger-cargo insurance as percentage of total operating expenses
United Airlines	$781,866,883	$5,607,896	$5,194,537	.00664
American Airlines	$621,000,000	$6,907,687	$4,524,682	.00728
Pan American, Pacific Division	$229,510,686	$2,110,580	$2,217,883	.00966
Pan American, Latin American Division	$182,892,997	$1,701,804	$1,153,515	.00636
Pan American, Atlantic Division	$295,906,060	$2,519,486	$2,089,245	.00702

Several interesting conclusions may be drawn from these figures:

1. Pan American, protected by Warsaw limitations as to most of its passenger claims, and operating entirely on international flights, had a higher passenger-cargo insurance cost (percentage-wise) than either of the two domestic airlines, who are *not* protected by Warsaw as to most passenger claims.

2. In four out of five instances, the cost of non-passenger insurance (not protected by any treaty) was greater than the cost of passenger-cargo insurance.

3. In any event, the total cost of passenger-cargo insurance, with or without Warsaw protection, is well under one percent (1%) of total operating costs.

What of the other 99% of operating costs, which cover such items as advertising, ticket sales, flight crew and ground maintenance labor costs, fuel, legal fees, and equipment depreciation? Clearly, none of these costs are limited by any international treaties. Yet, they are readily assumed by dozens of foreign airlines who compete energetically for a share of the U.S. international passenger market, the largest and most lucrative in the world. Indeed, many of these costs are necessarily paid at American prices in American dollars, since it is not possible to operate air services in the U.S.A. without having extensive personnel and equipment stationed here, and without extensive advertising and sales costs. In fact, it is well known that the Boeing and Douglas jet aircraft, manufactured in the United States, carry most of the world's international passengers, so that even equipment costs are mainly incurred at American prices. But in the scramble to pay these 99% of operating costs at prices much higher than those prevailing at

home, the foreign carriers cling to the one area protected by treaty, and seek to save a minute fraction of the less than one percent involved in passenger insurance, by continuing an archaic subsidy conferred on them at the expense of widows, orphans and cripples whose lives are shattered by air disasters.

Even in the claims area, foreign airlines readily accept American standards in many operations. For example, they must carry workmen's compensation insurance on thousands of their employes stationed in the U.S.A., and must carry liability insurance at standard rates on all their U.S.A. ground operations, since none of these areas are protected by treaty or subsidized by accident victims. Thus, the airlines operated by *amici* United Kingdom, Italy and Canada must pay full damages if they injure or kill Americans who may be strangers to them, through negligent operation of ground vehicles or negligent maintenance of ticket office premises; but as to Americans who patronize these airlines as passengers, they seek treaty protection and limitation of liability to a fraction of the actual damage!

This is the true economic perspective of the Warsaw Convention. The sole purpose of this treaty was to limit liability and to confer a subsidy on the carriers at the expense of those passengers least able to afford it—the ones who do not make it safely to their destinations. Probably the most complete answer to the groundless economic claims of Warsaw's proponents is the U.S. domestic airline system, which has developed into the largest, safest and most profitable in the world, without benefit of any specially enacted liability limitations.

b. ***The Warsaw Convention Confers No Benefits Upon Passengers—It Merely Takes Away Legal Rights They Would Otherwise Have. Its Sole Purpose Was to Limit Carrier Liability. All Ticketing and Documentation Procedures Developed Through Warsaw Are Also Available to Non-Warsaw Signatories Through I.A.T.A.***

When it became apparent after World War II that international air transport no longer needed special protection, the airlines and others interested in preserving the special economic advantages of limited liability attempted to portray the Warsaw Convention as a great boon to the traveling public. Various claims were made as to broadened legal rights obtained by passengers, despite the admitted original purposes of the Convention to benefit the airlines at the expense of the passengers. These claims are refuted by a cursory inspection of the reported American cases.

Apologists for the Warsaw Convention frequently claim that it protects American passengers from even harsher limitations of foreign laws, but the Courts have held that the Convention is a ceiling and not a floor. It does not create an independent cause of action but merely limits whatever greater rights the passenger may have under other applicable laws (*Noel* v. *Linea Aeropostal Venezolana*, 247 F. 2d 667).

In the same category, supporters of Warsaw make the general claim that the Convention protects American citizens who sue foreign airlines in foreign courts. Aside from the above refutation of the "floor" argument, it is important to note that there have been no reported cases of American passengers suing foreign airlines in foreign courts. Practically all of the world's international carriers do business in the United States and thus are amenable to suit here.

It is also sometimes claimed that the Convention gives the passenger a broader choice of venue for bringing suit, whereas the opposite is true. Since the Convention does not create a new cause of action, it is necessary to make personal service of process upon the carrier in accordance with local law. Article 28 further limits venue to four places: the carrier's domicile, its principal place of business, the place where the contract was made, or the destination. There are no such venue limitations in the local laws of our states, so that it is quite possible to have a Warsaw Convention case dismissed for improper venue or lack of jurisdiction, when the same case could have been maintained against the carrier without the Warsaw Convention (see *Berner* v. *United Airlines, et al.*, 149 N. Y. S. 2d 335; *Winsor* v. *United Air Lines*, 153 F. Supp. 244).

So far as the burden of proof is concerned, the Convention does no more than codify the rule of *res ipsa loquitur*, which exists in our state laws independant of the Convention. [For a collection of the State cases, see 6 ALR 2d 528].

In the civil law countries, there is actually a stronger presumption of negligence than res ipsa loquitur, without the Warsaw Convention. A typical provision is: "Every act whatever of an individual which causes injury to another obliges the one, because of whom it has occurred, to make up for it". [see Cohen, "Negligence Law in Europe", 361 Insurance Law Journal 82 (Feb. 1953)].

In suits brought in the United States for injuries or deaths occurring in foreign countries, when the Warsaw Convention is not involved, there is ample protection for the passenger in American law. American courts would not even have to consider the full faith and credit clause, which was involved in such cases as *Kilberg* v *Northeast Airlines, Inc.* (1961) 9 NY2d 34, 211 NYS2d 133, 172 NE2d

526; and *Pearson* v *Northeast Airlines, Inc.* (1962, CA2 NY), 309 F2d 553, 92 ALR2d 1162, certiorari denied in (1953) 372 U.S. 912, 9 L ed 720, 83 S Ct 726. Harsh foreign limitations could be disregarded under established American precedents; see *11 Am Jur, Conflict of Laws,* §6; *Loughran* v *Loughran* (1934) 292 US 216, 78 L ed 1219, 54 S Ct 684, rehearing denied in 292 US 615, 78 L ed 1474, 54 S Ct 861; *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.* (1934) 292 US 143, 78 L ed 1178, 54 S Ct 634, 92 ALR 928, rehearing denied in 292 US 607, 78 L ed 1468, 54 S Ct 772; *Coster* v *Coster* (1943) 289 NY 438, 46 NE2d 509, 146 ALR 702; *Masci* v *Young* (1932) 109 NJL 453, 162 A 623, 83 ALR 869, affirmed in *Young* v *Masci* (1933) 289 US 253, 77 L ed 1158, 53 S Ct 599, 88 ALR 170; *Dougherty* v *American McKenna Process Co.* (1912) 255 Ill 369, 99 NE 619, LRA 1915 F 955, Ann Cas 1913 D 568; *Usher* v *West Jersey R. Co.* 126 Pa 206; *Nat. Bank* v *Shaw,* 109 Tenn 237.

The C.A.B. Staff Study made for the IGIA consideration of Warsaw in 1962 concluded that the "existing regime of tort liability to which the carriers are now subject and for which they already have insurance" is adequate protection for the American domestic passenger (IGIA document —23/1.10A, Final Action, August 7, 1962, Attachment D, p. 8).

Warsaw apologists have often attempted to convey the false impression that the liability limitation is only one small part of the Warsaw scheme, and that it also includes a complicated and valuable system of ticketing and documentation, without which the processing of international flights would be seriously hampered. Examination of the Convention reveals nothing of substance other than the liability limitation and supporting procedures. In practice, there are many major nations which have never ad-

hered to Warsaw (e.g., Chile, Turkey), but which have always used the common international ticketing and documentation system. The plain truth is that this system is a product of the International Air Transport Association rather than Warsaw. Appendix B of the ATA-IATA *amici* brief shows that the airlines of Chile, Turkey and other non-Warsaw nations are members of IATA.

c. *Warsaw Does Not Reduce Litigation or Bring Uniformity of Law. By Injecting the Irritants of Arbitrary Limitations and Foreign Legal Concepts Into Normal Litigation Channels, It Actually Foments Protracted Litigation and Destroys Uniformity.*

Another claimed benefit of Warsaw is that it brings about "uniformity" in the administration of justice. Admittedly, Warsaw's objective is to be uniformly unjust to all its victims by limiting all recoveries to a fraction of the actual damage suffered. However, even within this narrow sphere Warsaw has not brought uniformity. Because of the many legal technicalities arising even under the old Warsaw Convention itself (without considering further complications caused by Hague and Montreal), the C.A.B. found in 1962 that only 53% of the claims against U.S. flag (overseas) airlines came under the Warsaw Convention during the period 1950-1960, leaving some 47% of such claims to be governed by other laws (IGIA document 23/1.10A, Final Action, August 7, 1962, Attachment A, p. 9). Furthermore, the most ludicrous instances of non-uniformity arise under Warsaw, for many times passengers seated right next to each other, even on flights within the United States, are governed by different laws because of Warsaw. The applicability of Warsaw depends upon the stops listed in the ticket of each passenger, rather than upon the place of accident or his immediate destination on the crash flight. In many accidents occurring on

our domestic airlines, there are some passenger claims limited by Warsaw and some which are not limited at all. Therefore, even the crude attempt at uniformity through denial of compensation has been ineffective.

If one were seeking to disrupt the natural forces of tort litigation, prevent reasonable settlements and thus foment protracted litigation, one would have to search hard for a better way to do this than to attempt to limit liability in aviation accidents. In this field, we have the combination of the highest earning power of victims, and the most serious and deadly injuries which are an inevitable result of the speed and destructive power of modern aircraft. Therefore, to limit liability in this field is to create such disparity between real damage and compensation as to give the plaintiff practically nothing to lose and everything to gain by litigating rather than settling. Because of this factor and because of the difficulties of interpretation which are to be multiplied by Hague-Montreal, our courts are now jammed with dozens, perhaps hundreds, of Warsaw cases which would otherwise have been disposed of years ago. An example is the litigation arising out of the Air France Paris crash of 1962, in which the claims for the deaths of 62 passengers are being litigated in the U.S. District Court, Northern District of Georgia. The opinion in Block et al. v. Compagnie Nationale Air France (Nov. 8, 1967) —— F 2d ——, 1967 CCH Neg Cases, p. 2307, which took the Fifth Circuit panel more than two years to write, deals with only one obscure provision of Warsaw, but it is a striking illustration of the obstructive nature of Warsaw when injected into the American legal system.

With the addition of the Hague protocol (as to some Warsaw signatories but not to others) and the Montreal agreement (as to some airlines but not others), it is difficult if not impossible even for aviation law specialists to

predict what law would apply to many international passengers today. Yet, in the face of this hopeless complication, the *amici* supporting petitioner, and the other international air carriers seek to avoid giving passengers adequate notice of Warsaw even today.

Warsaw brings further complication to litigation by creating the atmosphere for joining of non-carrier defendants, such as aircraft manufacturers, repair agencies and airport operators, none of which can claim the liability limitation. The more defendants, the more difficult ordinary settlement and litigation procedures become, particularly when the non-carrier defendants do not consider themselves primarily or even substantially liable, and feel that they have been joined only because the plaintiff can recover so little from the airline.

d. *Carriers and Insurers Who Claim That Warsaw's Liability Limitations Are Necessary, Use American Courts to Litigate Huge Hull Claims Which Dwarf Passenger Suits, and Which Are Not Limited by Any Treaty.*

Another argument made by Warsaw proponents is that airline passenger liability claims represent a catastrophic risk, which must be limited in amount, and which are not appropriate for ordinary damage litigation in U. S. courts. This argument is largely self-refuting in that we have always had the example of domestic passenger claim litigation, which has never been limited, is fully covered by liability insurance, and has successfully been accommodated by our American legal system without financial damage to the airline industry.

Moreover, this contention has lost all semblance of reason with the postwar advent of larger aircraft. In the jet airliner accident today, the damage claims for loss of the

aircraft hull usually run to more than five or six million dollars, and thus dwarf the amounts paid out on passenger claims.

There is a great deal of litigation in this country between airlines and aircraft manufacturers, in which the insurance company which paid the hull claims on a crashed airliner is actually suing the products liability insurer of the manufacturer. There are other suits pitting airline against airline, seeking to recover millions of dollars in hull claims caused by collisions. In some of these cases, the passengers on these crashed airliners are limited to $8,300 in claims by the Warsaw Convention, and yet the airline is free to sue for millions of dollars in property damage arising from the same accident! Thus, the airlines and insurers who support Warsaw's limitations against passengers, are not concerned over catastrophic claims and the imperfections of the American legal system, when it comes to litigation of their own claims against each other.

An example of this type of litigation is the case of *Braniff Airways, Inc.* v. *Curtiss-Wright Corp.*, U.S. District Court, Southern District of New York, several preliminary phases of which are unofficially reported at 7 Avi. 18,114 and 8 Avi. 18,255 (CCH Aviation cases). There, Braniff Airways seeks to recover $3,750,000 damages for loss of a DC-7C airplane which crashed in Florida on March 25, 1958, claiming that the defendant supplied defective engines which caused the crash. A number of passenger cases arising out of the same accident were governed by the Warsaw convention, but this has not deterred Braniff's hull insurer (a Lloyds' of London group) from suing the manufacturer (insured by another Lloyd's group) for over three million dollars. Soon, we shall see such claims in the area of ten to twenty million dollars per hull, when the "jumbo jets" and supersonic aircraft are

activated. It should be noted that the insurance cost figures set forth in section "a" of this Point II show that even in this early stage of the jet era, passenger-cargo liability insurance costs the airlines less than their hull and other types of insurance.

e. Warsaw Is Admitted by Its Strongest Proponents to Be "Completely Repugnant" to American Law. The Only Reported Decision Upholding Its Constitutionality Under the Seventh Amendment Rests on the Untenable Ground that the Right to Trial by Jury Does Not Include Assessment of Damages.

A strong insight into the real opinion of Warsaw held by its strongest proponents can be obtained from the minutes of the International Union of Aviation Insurers, which are published in the Appendix of the U. S. Senate Hearings on the Insurance Industry, Sen. Res. 231, 85th Cong., Aug. 6-15, 1958, at pp. 487-675. An example is the following quotation from page 497, referring to a statement of the American insurer's position on Warsaw by George G. Orr, director of claims for U. S. Aviation Underwriters, one of the two largest American aviation insurance groups:

> "As to the revision of the Warsaw Convention, he wanted to make the American position clear. American insurers had had plenty of experience of dealing with the Convention and were fully alive to its defects, but generally speaking, it had enabled settlements to be made at lower figures than the average for non-Convention cases and its validity had been upheld and affirmed by the American Courts in a series of cases. There were three dangers about revision. The first was that although revision would no doubt cure some of the defects, it might introduce new ones. In the second place, *there was quite a serious danger that*

a revised Convention might not be ratified by the American Senate, since the Convention contained several principles which were completely repugnant to American law and the original Convention owed its easy passage through the Senate to the exceptionally wide powers exercised by President Roosevelt at that time. Finally, even if the revised Convention were passed, it would necessitate fighting a series of actions in the Courts to establish its validity and the existing decisions would be rendered valueless." (Emphasis supplied.)

In the 38 years since the drafting of the Warsaw Convention, and the 33 years since the United States adherence, there has been only one written court opinion on the constitutionality of the Convention under the Seventh Amendment, which guarantees the right to trial by jury in civil cases involving more than $20.

The Convention was attacked under the Seventh Amendment in *Pierre* v. *Eastern Airlines et al.* (1957), 152 F. Supp. 486, in the U.S. District Court for the District of New Jersey. Counsel for *amicus* Holtzman was one of the counsel for the plaintiff, and knows that the question was very carefully briefed by both sides. In addition, the United States of America intervened in order to defend the constitutionality of the Convention, and government attorneys were granted delays of several months to prepare their briefs. Appearances were entered by the local United States Attorney, by an Attorney from the Justice Department in Washington, and by two legal advisers to the State Department from Washington.

After this thorough briefing and argument, the Court was able to declare the Warsaw Convention constitutional *only* by holding that the right to trial by jury relates solely

to liability, and does not cover the assessment of damages. It is patent from a reading of the Court's opinion that if the assessment of damages was considered part of the right to trial by jury under the Seventh Amendment, that the Warsaw Convention would be unconstitutional, since, in the words of the Court, "No treaty may authorize what the Constitution forbids. *Geofroy* v. *Riggs*, 133 U.S. 258."

The Court in the *Pierre* case did not cite a single precedent for the holding that jury trial does not include the right to fixing of damages, even though dealing with a subject hundreds of years old.

There is, of course, ample authority for the basic principle that the constitutional right to trial by jury includes assessment of damages; see *Dimick* v. *Schiedt* (1935), 293 U.S. 474, at p. 486, 79 L ed 603, 611, 55 S Ct 296, 95 ALR 1150; *Smyth Sales* v. *Petroleum Heat & Power Co.* (1944, CA 3), 141 F.2d 41 at p. 44; Blackstone's Commentaries, Sharswood 1896, Vol. II, Book III, Chap. 23, Trial by Jury, p. 376.

The *Pierre* case was settled above the Warsaw Convention limits, so that the appellate courts had no opportunity to rule upon the emasculation of the right to jury trial which was found necessary to support constitutionality. Counsel for *amicus* Holtzman has attempted to raise these constitutional issues in other Warsaw cases, including *Eck* v. *United Arab Airlines, Inc.* (1964), 15 NY2d 53, 255 NYS2d 249, 203 NE2d 640, 6 ALR3d 1260, but the decisions to date have been based on other grounds.

f. *U.S. Adherence to Warsaw Has No Effect on Operating Rights to Foreign Countries.*

Warsaw apologists frequently imply that if the U.S. denounced Warsaw, or if American courts did not fully

support Warsaw's carrier subsidy at the expense of accident victims, the operating rights of American carriers into foreign countries might be jeopardized. This argument has never been supported by the Department of State, for the simple reason that operating rights are a matter of reciprocity. If *amicus* Italy became angry at the final result in *Lisi,* and decided to revoke the operating rights of American carriers into Rome, she would be losing her own lucrative rights to New York, and her share of the American market which is critical to the financial survival of her international airlines.

g. Anachronistic Limitations on Wrongful Death Recoveries in a Few American States, Cited as a Parallel to Warsaw, Are on the Way Out; Are Being Circumvented in Many Aviation Cases; Are Subject to State Legislative Control; and in Any Event Cannot and Do Not Apply to Personal Injury Cases Such as Lisi.

Warsaw proponents frequently argue that Warsaw does little more than parallel the limitations on recovery which may be found in wrongful death statutes of a number of our own states.

This argument would set our legal standards at the lowest level of our public morality. It is true that there are still twelve states which have monetary limitations on recovery for wrongful death. However, the entire trend in the past quarter-century has been away from this 19th Century railroad-inspired attempt to cheapen human life. A review of the early wrongful death cases reveals that most of them were brought against railroads, and it is evident that the damage limitations were enacted by railroad-controlled legislatures (see *DeSoto Motor Corp.* v. *Stewart,* 62 F. 2d 914; *Poff* v. *New England T & T Co.,* 72 N.H. 164, 55 Atl. 891; *Speiser, Recovery For Wrongful Death* (1966), pp. 489-494.)

Every one of these states has raised its limitations substantially in recent years; and rarely does a session of their legislatures go by without the introduction of a bill to remove all limitations. Many other states which had such limitations have removed them completely in the past two decades. All of our federal legislation touching upon such claims has been enacted without limitations (e.g., Federal Employers Liability Act, Federal Tort Claims Act, Death on the High Seas Act.) Some of our states have constitutional prohibitions against such limitations. Furthermore, the Warsaw Convention limits recoveries not only in death cases but in personal injury cases as well. This our state legislatures could not constitutionally do even if they were so inclined.

Such decisions as *Kilberg* v. *Northeast Airlines, Inc.* (1961), 9 NY2d 34, 211 NYS2d 133, 172 NE2d 526, and *Pearson* v. *Northeast Airlines, Inc.* (1962, CA2 NY), 309 F.2d 553, 92 ALR2d 1162, certiorari denied in (1963) 372 US 912, 9 L ed 2d 720, 83 S Ct 726, have pointed the way to circumvention of these harsh limitations in the more enlightened majority of jurisdictions which have no such limits. The non-limit jurisdictions coincide generally with the large population centers such as New York, California, Illinois, Texas and Florida, where most aviation accident litigation takes place. For further discussion of this point, see *Speiser, Recovery for Wrongful Death* (1966), pp. 721-742.

III.

The *Amici* United Kingdom, Italy and Canada Are Owners or Controllers of International Air Carriers. Their Position on the Warsaw Convention Should Be Considered in That Light.

a. *In General*

Since they appear by leave of this Court, the *amici* foreign governments—United Kingdom, Republic of Italy and Canada—have the right to present their arguments in favor of petitioner's position. But, as *amicus* on behalf of a concededly interested person, Holtzman, we wish to point out that these *amici* governments do not occupy the impartial position of uninvolved sovereign, as does the Government of the United States. These *amici* are all owners, or principal stockholders, of international air carriers and have a definite financial and pecuniary interest in the provisions of the Warsaw Convention limiting the amounts recoverable for the injury or death of passengers on international air flights. They are as "disinterested" as IATA, or as would be Pan American Airways or Trans World Airlines.

Ever since the "Brandeis brief" submitted to this Court in 1908 in *Muller* v. *Oregon,* 208 US 412, 52 L ed 551, 28 S Ct 324, this Court has taken judicial notice of economic facts of general knowledge. We ask it to do so in this case, with respect to the total or controlling ownership of international air carriers. These facts are known to the world; and are undisputed. Reference is hereinafter made to the facts stated in the "World Airline Record," 6th Edition of 1965, known as the "standard reference of the industry," and published by Roadcap & Associates, 327 South

La Salle Street, Chicago 4, Illinois (hereinafter referred to, by page, as "World Airline").

The positions taken by various governments at international conferences concerning international private air law, held between 1929 and 1966, throw considerable light not only on the purpose and meaning of provisions of the Warsaw Convention and of the Hague Protocol, but also on the attitude and position of such governments with respect to the relative rights, duties, and liabilities of international air carriers, of international air carrier passengers and their baggage, and of internationally carried air cargo. These include international conferences on private air law, meetings of the Legal Committee of ICAO—the presently existing International Civil Aviation Organization—and meetings of ICAO itself. These various international conferences and meetings were all reported or recorded, and the various "Minutes" or "Documents" emanating therefrom reflect the positions taken by various governments.

References are made hereinafter to: the Second International Conference of Private Air Law held at Warsaw from 4-12 October, 1928, officially reported in the French language in Document: 7838, reprinted under the authority of the Secretary General of what was then "OACI" with the authorization of the Government of Poland, and referred to throughout this brief as "Warsaw Minutes"; the International Conference on Private Air Law held at The Hague in September, 1955, reported in ICAO Document 7686—LC/140, and referred to hereinafter throughout as "Hague Minutes"; to Volume II of the Hague Conference of 1955, same document number as the immediately foregoing, referred to as "Hague Documents"; the meeting of the Legal Committee of ICAO (Ninth Session) held at Rio de Janeiro from 25 August through 12 September,

1953, reported in ICAO Document 7450—LC/136, and referred to as "Rio Minutes"; and the Special ICAO Meeting on "limits for passengers under the Warsaw Convention and the Hague Protocol," held at Montreal, 1-15 February, 1966, reported in ICAO Document 8584—LC/154-1, and referred to as "Montreal Minutes."

b. *The Republic of Italy*

As to Alitalia itself, the petitioner, and the interest therein of the *amicus* Republic of Italy (hereinafter "Italy"), World Airline reports, at pages 203, 204: "Alitalia was formed on September 16, 1946, by the Italian Government and British European Airways." . . . "Under the original 1946 agreement setting up Alitalia, BEA terminated its holdings in the company in 1961 by selling its shares to the Institute for Industrial Reconstruction [an Italian governmental agency]. The Institute now holds 74.6%; other government agencies, 21.6%; and private stockholders, 3.8%." It is undisputed that Italy owns over 96% of the stock of petitioner Alitalia.

Remarks of representatives of Italy at the various international conferences and meetings on private air law, prior to the adoption of the Warsaw Convention and of the Hague Protocol, tellingly reveal that Italy was then much more concerned with the welfare of international air passengers and their families, before it became the principal owner of petitioner Alitalia.

The head of the Italian delegation at Warsaw in 1929 was Signor Giannini, Member of the Council of State and Minister Plenipotentiary. (Warsaw Minutes, page 6). Signor Giannini took a very active role in all the Warsaw meetings, debates and exchanges, and presided at the efforts of a preparatory commission charged, at the beginning of the Warsaw meetings, with the responsibility of

classification and collation of amendments to the previous CITEJA draft which had been proposed by the various delegations on behalf of their governments before the international conference was commenced (Warsaw Minutes, pages 19, 20, 22). Giannini noted that the contemplated convention (later, the Warsaw Convention) was not a fixed, immutable monument nor the law of the Medes and the Persians. He said (page 23 of Warsaw Minutes):"

> "ce que nous allons faire ici n'est qu'un premier essai de codification, un premier effort pour codifier le droit aérien. Il est évident, que si nous insérons dans la convention une clause expresse pour dire qu'il faudra la réviser, soit à des périodes déterminées, soit quand quelques Etats montreront aux autres la nécessité de faire cette révision, nous établirons dès aujourd'hui le principe que ce premier effort que nous faisons aujourd'hui n'est pas définitif.
>
> Je sais bien qu'il n'y a aucune convention définitive, je dirai même heureusement! Mais ce caractère particulier de premier effort est clairement accusé dans les propositions que j'ai signalées et je me permets d'appeler votre attention sur ce point, parce que ceci répond peut-être à la manière de voir des Délégués. Nous devrions donc considérer que, dans, la navigation aérienne, il faut commencer par poser les grandes règles générales du problème; nous faisons un premier effort et nous devons être heureux de le faire. S'il y a des améliorations à apporter, la vie ne s'arrête pas aujourd'hui, nous pourrons les faire par la suite."

This may be translated as follows:

> "what we are about to do here, is merely a first attempt at codification, a first effort to codify air law. It is evident that if we insert in the convention a

clause expressly designed to ask for a revision either at determined periods, or when a few States will show to the others the necessity for this revision, we shall, as of today, establish the principle that this, the first effort we are making today, is not definitive.

I know that there is no definitive convention, I should even say luckily! But this particular character of first effort is clearly visible in the proposals I have pointed out, and I call your attention to this point, because this may be the answer to the way of thinking of the Delegates. We should therefore consider that, in air navigation, one must begin by posing the large general rules of the problem: we are making a first effort and we must be happy to do it. If improvements can be made, life does not stop today, we can make them subsequently."

In addition to the sensible acknowledgment that the Warsaw Convention would merely be a first effort, Signor Giannini, at Warsaw in 1929, voiced Italy's then concern for international air passengers, when he made the forthright statement (Warsaw Minutes, page 32):

"La Délégation italienne tient à déclarer que, d'après sa conception, il faut qu'il y ait l'harmonie des intérêts nationaux. Dans ces conditions, quand nous nous trouvons en presence of d'intérêts organisés comme ceux des armateurs, et d'intérêts non organisés des transportés, nous considérons qu'il ne faut pas oublier ces derniers, autrement il n'y a pas cette harmonie des intérêts qu'il faut garantir.

En conséquence, commes directives générales de la Délégation italienne, je dois dire que no sommes disposés à accepter aucune mesure de faveur ou de par-

ticulière indulgence vis-à-vis des armateurs. Cela veut dire que pour ce qui est de l'intérêt de la navigation aérienne, c'est-àdire de l' intérêt national, oui; pour ce qui est privilège ou faveur, non."

The foregoing may be translated as follows:

"The Italian Delegation must state that, according to its conception, there should be harmony of the national interests. In these conditions, when we find ourselves facing organized interests like those of the ship owners and of non-organized interests, like those of the passengers, we feel that the latter should not be forgotten, otherwise we do not have the harmony of interests which must be guaranteed.

Consequently, as general directives of the Italian Delegation I must say that we are not prepared to accept any measure of favor or of particular indulgence toward the ship owners. This means that for what touches the interest of air navigation, that is of national interest, yes; for what is privilege or favor, no."

In 1955, Italy had not yet entirely abandoned its interest in the welfare of airline passengers. Its main representative at the Hague was Professor Ambrosini, who had also represented his government at Rio in 1953. According to the Hague Minutes (page 131, middle of page), he declared:

"that the Protocol should include a sanction, specifically, a private law sanction. The reason for the sanction was that the passenger ticket, being a fixed-term contract (contrat d'adhesion), the passenger had to accept it without being able to discuss the clauses set out therein. Under these circumstances, the passenber should receive notice, through a clause inserted in

the ticket, that there was a limitation of liability, that is, that there was a deviation from the general principle of law that all damage should be fully compenstated. For this reason, Mr. Drion's arguments were not valid. Mr. Drion had asked why the carrier should pay without limitation if the absence of a ticket did not by itself give rise to actual damage. The reply to this question was that the carrier should be subject to unlimited liability because he had violated the principle of public policy to the effect that the passenger should be given notice of the limitation of liability."

Although this amplifies what the Professor had earlier said in the Hague Meetings (Hague Minutes, page 67)—

"His Delegation also wished to have a sanction in the case where the carrier did not deliver a ticket or the ticket did not state that the carriage was subject to the Warsaw Convention"—

it is a far cry from the "airline owner" position now taken by Italy in its brief as *amicus*. Perhaps this later airline-owner status of the Italian Government also accounts for the lack of statements from Italian representatives illustrating concern for passengers at the Special Meeting of ICAO in Montreal in 1966, notwithstanding that Italy had four representatives at Montreal (Montreal Minutes, Annex A, preliminary page xiv), and the Delegate of Italy (Montreal Minutes, page 46, middle of page),

"wished to confirm his spirit of co-operation and his faith in the Warsaw Convention."

c. The United Kingdom

The international air carriers of the United Kingdom are British European Airways Corp. ("BEA") and Brit-

ish Overseas Airways Corp. ("BOAC"). Who owns BEA and BOAC? World Airline declares, at page 241 et seq., that BEA is a public enterprise owned by the Government; the same work announces, at pages 248, 251, United Kingdom's ownership of BOAC.

The representatives of the United Kingdom (hereinafter "UK"), moreover, at the various international conferences and meetings concerning air law, have not been bashful in showing their concern for the welfare of the international air carriers.

The chief of the UK delegation, at Warsaw in 1929, was Sir Alfred Dennis. The various national representatives were discussing principles of exoneration or limitation of liability of international air carriers, and the law as to maritime and railroad carriers and their freedom from, or limited, liability. In discussing a maritime convention of 1924, and a proposed UK amendment to the CITEJA pre-1929 draft which amendment would limit air carrier responsibility, Sir Alfred said:

> "Cette convention reproduisait originairement les conditions qui se trouvent dans le droit maritime et c'est pour cette raison que mon Gouvernement a accepté provisoirement et dans ses lignes générales le projet de convention de 1925 sur la responsabilité du transporteur. Depuis, au cours des discussions, sont intervenus des changements qui ont modifié le caractère général de ce projet de convention en ce qui touche la responsabilité due transporteur. Mon Gouvernement m'a recommandé de soutenir aussi énergiquement qu'il me serait possible mon amendement, parce qu'il trouve que, dans l'ensemble, la responsabilité qui est imposée au transporteur est beaucoup trop lourde."

A translation of the foregoing is:

> "This convention reproduced originally the conditions which are formed in maritime law, and it is for this reason that my Government accepted, temporarily and in its principal lines, the draft of convention of 1925 on the responsibility of the carrier. My Government has urged me to support as energetically as would be possible, my amendment because it finds that, as a whole, the responsibility put upon the carrier is much too heavy."

UK's concern for the carrier has been steadfast and consistent. After UK had adopted the Warsaw Convention as the *internal law* of UK in 1952 (See the First Schedule of English Carriage by Air (Non-International Carriage) Order, 1952 [S.I. 1952, No. 158]), UK's delegation at Rio in 1953 kept up its steady pressure against those provisions of Warsaw which attempted to afford some modicum of notice and protection to the international air passenger or air shipper. Here is UK's proposal to abolish all provisions relating to documents of carriage, plus its casual denigration of any right at all of a passenger to know that carriage is subject to Warsaw, as stated by its representative (Rio Minutes, pages 50, 51):

> *"Mr. Wilberforce* (United Kingdom) stated that the British Delegation was of the opinion that Articles 3 to 11 were superfluous and out of date and that they should be entirely deleted. Therefore, he proposed the deletion of these Articles for the following reasons:
>
> i) he considered that the framers of the Warsaw Convention had made one of their rare mistakes when they had decided to deal in the Convention with this question of documents of carriage. Docu-

ments of carriage fell within the administrative field. Documentation was a matter of detail, a practical matter which required revision from time to time, and it was unfortunate that it had been decided, in 1929, to include very detailed provisions in the Convention. The result was that they could not be amended unless by a new Convention. It would have been wiser to leave these provisions outside the Convention;

ii) he considered that these provisions were wrong in a number of respects. The Rapporteur had drawn the attention of the Committee to the particular difficulties concerning Article 3, but the same objections of a practical nature could be raised against the other Articles. It was to be borne in mind in that connection that, since 1929, there had been an enormous development in carriage by air, in particular, as regards the carriage of goods. The provisions in question caused serious difficulties to those who were engaged in such carriage;

iii) it was apparent that the various particulars, and especially those relating to the air waybill, were completely out of date, that it was not possible to comply with them and that, in fact, the carriers did not comply with them.

In proposing the deletion of these provisions, the Delegation of the United Kingdom was not advocating international anarchy. It was quite right that the interested parties should get together and try to reach agreement from time to time on documents of carriage for air transport, but it was not right that these provisions be set out in a Convention which could not be amended. This matter should be left to the Inter-

national Air Transport Association which could meet each year or twice a year and adapt them to changing needs, or the International Civil Aviation Organization which could adapt them to changing needs, or, lastly, to some organization of an administrative character which could continually revise them as necessary.

Some Delegates might consider, as had been the case in the past, that there should be—in any case as regards the carriage of passengers—a provision requiring that it be brought to the notice of the passenger that the carriage was subject to the Warsaw Convention. The British Delegation did not attach much importance to this but, if some Delegates considered that such a provision was necessary, his Delegation would not be opposed. The problem could be solved by a very simple provision which stated merely that a ticket must be issued to passengers and that it must contain the declaration to the effect that the carriage was subject to the terms of the Warsaw Convention.

If the Committee would not agree to the total deletion of the Articles on documents of carriage, the British Delegation would then have to propose certain amendments to the Warsaw Convention."

The fact that some delegations had described even the existing Article 3(2) of Warsaw –the Article now before this Court for construction in the instant cases—as "savage" and "illogical", did not deter the UK delegation. At page 57 of Rio Minutes;

"*Mr. Wilberforce* (United Kingdom) said that it was impossible for him to accept the solution which consisted in retaining the present provisions of the Convention as they were. Having looked at the Ar-

ticles (in question) of the Convention as a lawyer and having noted that there were serious defects in these Articles, he considered that it was his duty to do his best to eliminate such defects. It might be that the governments would consider later on that the improvements which the lawyers had attempted to make were not important enough, from the practical point of view, to justify the meeting of a diplomatic conference but, as lawyers, the members of the Committee could not adopt an attitude which would mean that they accepted the provisions such as Article 3 (2), which had been described as a savage and illogical provision, and Article 9, which provided that, if the number of packages, the nature of the packaging, etc. were not included in the air waybill, the provisions which excluded or limited the liability of the carrier would not apply. How could a lawyer accept Article 6 which was altogether contrary to practice and which could not be complied with by an efficient carrier?"

Because of determined opposition from all quarters, however, (Rio Minutes, page 58). "The proposal of the United Kingdom to delete Articles 3 to 11 was withdrawn."

The UK attack on Article 3 (2), or any amendments to it that would have the effect of letting the passenger know that his flight was subject to the limited liability provisions of Warsaw, continued. Again at Rio (Rio Minutes, page 182):

> "*Mr. Wilberforce* (United Kingdom) said that the article under discussion dealt with sanctions imposed on the carrier for not doing certain things. If this article did not exist, the position would be that, under the contract, the carrier would be, as a matter of common law, responsible for any damage on account of

the incorrect statements or omissions in the contract for which he was responsible. Therefore, the only purpose of introducing a special provision at this place of the Convention must either be to decrease the carrier's contractual liability in certain events, or to increase the contractual liability."

Shortly before that, at Rio, UK delegate and Rapporteur Major Beaumont (co-author of Shawcross and Beaumont on Air Law, which is referred to on pages 13, 15 of petitioner's brief herein as written by "leading writers" and as though it were objective and impartial in nature), had stated what he regarded as "the law"—a statement, admittedly, perfectly consistent with the present position of petitioner Alitalia and the various *amici* now supporting that position (Rio Minutes, page 177):

"*Mr. Beaumont* (United Kingdom), Rapporteur, said that the particulars to which Mr. Calkins had referred in Article 3 (i) (a), (b), (c) and (d) of the Warsaw Convention were not obligatory particulars, because Article 3(2) of the Convention made it very clear that it did not matter at all if any of those particulars were omitted. Carriers were not obliged, at present, to insert any of those particulars in the ticket and the omission of the particulars would not affect the position of the carrier or the passengers. The Convention should state definitely the particulars which must be contained. The Working Group had rightly limited the particulars which must be contained to those which were made obligatory under Article 3 of the existing Convention, including particulars which indicated whether or not the carriage was international."

The "Mr. Calkins" referred to was the chief delegate of the United States at both Rio and at The Hague and was then Chief, International and Rules Division, Civil Aeronautics Board, as shown by Hague Documents, page 21.

Again, at The Hague in 1955, UK returned to the attack. The effort to eliminate Article 3 of Warsaw and the related articles was renewed in 1955 with undiminished vigor by Mr. Wilberforce. In so doing, he took notice of court decisions, including a 1936 British holding which had taken the strict view that it was necessary to warn the passenger. The remarks are quoted in extenso to reveal the true position of the UK with respect to rights of the passenger (Hague Minutes, pages 46-48):

> "*Mr. Wilberforce* (United Kingdom) said that, at Rio de Janeiro, the United Kingdom Delegation had put forward a proposal that all the articles in the Warsaw Convention which related to documents of carriage, that is to say, Articles 3 to 11 inclusive, should be deleted. That proposal was not voted on at the Rio meeting, because it had been thought that a compromise might be adopted which would simplify the Warsaw Convention and yet preserve something relating to the subject. Having reconsidered what had been achieved at Rio de Janeiro, the United Kingdom Delegation now wished to invite the Conference to reconsider seriously the question whether it was desirable to maintain anything in the Protocol which related to documents of carriage at all.
>
> The provisions of the Warsaw Convention relating to documents of carriage were, in modern conditions, unsatisfactory. First of all, Article 3, relating to the passenger ticket had been described by high authority as futile and absurd, because it required delivery of

a ticket without seeing what the ticket was going to contain. . . .

There were, therefore, two questions in respect of which some step had to be taken. Firstly, were the present provisions contained in the Rio Protocol satisfactory, or could they be made satisfactory? Secondly, would the consequences of the total omission of these provisions be unfortunate or not? . . . The second respect in which the present provisions were unsatisfactory related to the sanctions to be imposed on non-compliance. The Rio Protocol imposed the sanction of unlimited liability. Consequently, a slip made by a booking clerk, or a perfectly unintentional error as to law, was visited by the same consequences as wilful misconduct. If the provision under discussion were read together with Article 25 as at present drafted, the result would be that the pilot or navigator, on whose skill the passenger relied for his safety, could be as negligent as he pleased, and yet liability would be limited. But, if a booking clerk made a mistake, liability was unlimited. That was difficult to defend from the legal point of view. On the other hand, if this solution were rejected, what alternative could be provided? A number of solutions were suggested in the documentation and the Conference might find it difficult to agree on what was the best of them. The provisions on documents of carirage were not satisfactory as they stood and the United Kingdom Delegation felt very grave doubts whether the Conference would be able to agree by a sufficient majority on satisfactory provisions to replace them.

The second question was in regard to the consequences of total omission. Would those consequences be unfortunate? In practice, the forms of tickets were worked out by commercial organizations connected

with air transport. In this regard, he was thinking not only of IATA but also of other carriers. It might be said that if there were nothing in the Convention, that would place too great power in the hands of those bodies and the passenger and the consignor of goods would consequently be helpless. He did not think that this would be so, for the reason that account had to be taken of the fact that many courts in many countries took a very strict view of any attempt to impose limitations of liability or to exclude liability and only gave effect to such limitations or exclusions if they were brought to the notice of the passenger. The carrier issuing a ticket had to take this into account Convention or no Convention and this provided a very effective safeguard. The United Kingdom Delegation was not speaking entirely from theory in that respect since the courts of the United Kingdom were among the ones thtat took a very strict view as to the necessity of warning the passenger. The case of *Westminster Bank vs. Imperial Airways Limited*[1] showed what a strict view the United Kingdom courts would take. Nevertheless, in spite of that, the United Kingdom applied the Warsaw Convention to domestic carriage within the United Kingdom and within the territories over which it was competent to legislate without applying the provisions of the Convention concerning documents of carriage. During the three years in which that legislation had been in force, no difficulty whatever had arisen. He commended that experience to the Conference as an indication of what would happen if the provisions on docu-

[1] United Kingdom King's Bench Division: [1936] 2 All E.R. 890; 155 L.T. 86; 52 T.L.R. 607; 80 Sol. Jo. 794; 42 Com. Cas. 1; 55 Lloyd, L.R. 242; (1936), U.S. Av. R. 39.

ments of carriage were removed from the Convention altogether.

There were two main arguments which had been used against the United Kingdom proposal. The first argument was that, if these provisions were deleted, the result would be a lack of uniformity in an important matter. But, he wondered whether the bare skeletal requirements of the Protocol, or even those of the Warsaw Convention itself achieved uniformity in regard to documents of carriage. All uniformity, in fact, came about, not because of the provisions in the Convention, but because of the sharing of experiences among commercial men. What brought uniformity was practice and not legislation of this kind. . . . He reminded the Conference that, at the Rio meeting, all commercial opinion which expressed itself was in favour of the deletion of these clauses. He referred to such bodies as the International Chamber of Commerce, the International Union of Aviation Insurers and the International Air Transport Association. Regard should be paid to the views of those bodies and the Conference could do no greater service to the advancement of civil aviation on an effective basis than by deleting the provisions under discussion from the Convention."

The correct and logical answer to the arguments of UK, as stated above and as stated over and over at the various international meetings, was given by M. Garnault, Delegate of France at the Hague meeting (Hague Minutes, pages 50, 51, when he rejoined:

"it should be remembered that air transport existed not only for the benefit of the carriers, but also for the users, that is, the nationals of the States represented

at the Conference. Since the principal object of the Convention was to subject the carrier to a more favorable regime of liability than that usually established by common law, it was equitable to consider the situation of the passenger and to draw his attention to the fact that, by participating in a specific carriage, he would, in consequence, be restricted in his rights. It had been said that the booking clerk would have difficulty in determining whether the Convention was applicable. Would the passenger have less difficulty in solving the same problem? Which of the two would be better able to solve the problem? The employee of the carrier skilled in his work and carrying out his habitual activity, or an occasional passenger? If either of the two parties mentioned were going to be placed in difficulty, the French Delegation would not hesitate to have the difficulty borne by the employees of the carriers."

"He was not convinced by the argument of Mr. Wilberforce to the effect that no difficulty had been encountered by the omission from the internal English law of the special provisions of the Convention concerning the form of the documents of carriage. If English users of air transport were always placed under a system of limited liability of the carrier whether the carriage was under English law or under the international Convention, there was no point in warning them by a special provision in the document of carriage. He was interested in an entirely different case, the case of a user in a country which had not included the provisions of the Warsaw Convention in its internal law. Such a user might, under his national law, have the benefit of a system of unlimited liability of the carrier when the internal law was applicable, and might be quite ignorant of the fact that,

when he undertook a journey under the Warsaw Convention, he would be subject to the restrictions of the Convention."

The position of the United Kingdom is similar, as Mr. Wilberforce said at The Hague, to that of IATA and of the International Union of Aviation Insurers ("IUAI"). This is easier to understand when one remembers that the limitations and restrictions of the Warsaw Convention are the *internal law* of UK; limitations, consequently, are the public policy of the United Kingdom as deliberately fixed by "The High Court of Parliament." The public policy in the United States, of course, as to limitations of liability on behalf of public carriers of passengers, is precisely the opposite.

d. *Canada*

Canada also files a plea on behalf of petitioner for a strict, literal construction of the Warsaw Convention. But Canada, also, is the owner of an international air carrier. The airline Air Canada (earlier Trans Canada Airlines), as World Airline notes at page 272, has its stock control "vested in the government-owned Canadian National Railways." Canada is thus an owner financially interested in recoveries for passengers injured or killed, on international air flights.

In 1929, Canada was a Dominion, and was not represented, per se, at the deliberations at Warsaw. Representatives of the Canadian Government did participate actively in the deliberations in Rio in 1953, at The Hague in 1955, and in Montreal in 1966, as is indicated hereinafter by references to the Minutes of those three conferences.

Mr. Nadeau of Canada, at Rio, originally supported the UK proposal for the elimination of Articles 3 to 11 of

the Warsaw Convention, stating (Rio Minutes, page 55): "the Canadian Delegation was in entire agreement with the proposal of the United Kingdom. Articles 3 to 11 of the Warsaw Convention should be completely eliminated." Later expressions of Canada at Rio and at the Hague, showing concern for the passenger and his notification of Warsaw limits, are somewhat difficult to reconcile with Canada's present position as purported *amicus* demanding a harsh and literal construction of Article 3 (2) of the original Warsaw Convention. Most of these statements emanate from Brigadier M. C. Booth who was the leading spokesman for Canada in Rio and at The Hague.

For instance, at the Rio meeting (Rio Minutes, page 118):

> "He asked if there was some special reason why the air carriers should enjoy a preferential treatment on this question of a limit of liability. It might be that in certain States, liability was limited in other modes of transport, but, in the areas with which he was familiar, liability was not limited in most other modes of transport. The liability of railways, buses and taxis was certainly not limited. Therefore, if the Committee decided to limit the liability of the air carrier, it should not be limited beyond a reasonable level.
>
> The liability of the operator of the aircraft had been limited in the Rome Convention to prevent the results of an accident from being catastrophic for the operator in question. It might be suggested that this was the basis on which the limitation of liability of air carriers under the Warsaw Convention should be established. However, this was not being proposed. The liability of the operator in respect of each person killed or injured was limited to 500,000 Poincaré francs under the Rome Convention. While it was true that, in that

Convention, different considerations applied, it would not be unreasonable to say that a human life under the Warsaw Convention should surely be worth at least half of what it was worth under the Rome Convention.

The cost of insurance had been constantly decreasing since 1946. For a return trip between New York and Rio de Janeiro, insurance could now be purchased for $1.00 for each $10,00 worth of insurance. The economic consequences for airlines would, therefore, seem to be negligible if the limit of the existing Convention were doubled or even tripled."

Whatever Canada's position may be in its *amicus* brief, it is clear that at Rio in 1953, Canada specifically recognized the importance of a passenger receiving notice so that he might procure insurance for additional protection of his family and himself. Brig. Booth (Rio Minutes, page 181) said:

"It had already been pointed out that the Working Group's text did not provide any adequate sanction in the case where a passenger was not given notice that the liability of the carrier to him might be limited by the Convention. This was an important fact. Passengers on airlines were from all walks of life and, certainly, the vast majority of them had never heard of the Warsaw Convention and had no knowledge of the fact that the liability of the carrier to the passenger might be limited by that Convention. It was important for every passenger to have this knowledge, so that, if he considered it necessary, he might take out additional insurance for his own protection over and above the amount for which the carrier would be liable."

Again, after noting that the agreement that the sanction imposed on the carrier by Article 3 (2) of the Warsaw Convention was unsatisfactory, (Rio Minutes, page 189), he added (same page):

> "was it necessary to provide for a sanction in the case where the passenger ticket had not been delivered, or where the statement that the carriage was subject to the rules relating to liability established by the Convention was not included in the ticket? In the view of the Canadian Delegation, the sanction provided by the existing Convention and the French proposal, whereby the application of the limits was excluded in the case of the non-delivery of the ticket, was too harsh, and should not be retained. On the other hand, the Canadian Delegation was of the opinion that it was important to notify the passenger that the liability was that provided by the Convention. The application of the limits of liability should, therefore, be excluded, in the case where the statement concerning the application of the Convention was not set out in the passenger ticket. This was the principle behind the proposal made by Canada."

Then, at The Hague, in 1955, (Hague Minutes, page 65), Brig. Booth's position was that

> "He felt that there was just one essential requirement, namely, that there be notice to the passenger along the line indicated by the Netherlands Delegation, the United States Delegation and by some others. His Delegation was opposed to sanctions, because it believed it to be the responsibility of the national law to ensure that its airlines comply with any requirements that might be contained in a convention such as this."

This opposition to a sanction is consistent with a later statement (Hague Minutes, page 132, near bottom of page).

Canada did note support for some "upward revision" of Warsaw-Hague limits at the Montreal meeting in 1966 (Montreal Minutes, page 17, at bottom, page 42, at top, page 97, page 130). But any concern for notification to the passenger of these limits—to whatever amount they might be raised—does not appear.

e. *ATA and IATA, the Air Transport Trade Associations*

The nature of the interest of the Air Transport Association of America ("ATA") and of the The International Air Transport Association ("IATA") is in part shown by the direct quotation from the brief (page 2 thereof) filed by these two trade and service organizations as *amici:*

> "ATA is a voluntary trade and service organization whose membership comprises virtually all of the scheduled, federally-certificated airlines of the United States. The names of the airline members of ATA are set forth in Appendix A to this brief. IATA is a body politic incorporated in 1945 by special Act of Parliament of Canada, 9-10 George VI, as an organization of the world's scheduled airlines. IATA has a membership of one hundred airlines from over sixty nations of the world. The names of the IATA member airlines are set forth in Appendix B.
>
> The airline members of both associations have a substantial interest in the matters at issue in this case. All of the members of ATA and IATA participate in the carriage of international air traffic—over their own international routes, through interline arrangements with other carriers, or a combination of both."

As APPENDIX B, at page 2a, of the brief of these *amici* further shows, among the numerous members of IATA are

included petitioner Alitalia of the *amicus* Republic of Italy, BEA and BOAC of *amicus* UK, and Air Canada of the purported *Amicus* Canada. Indeed, as Mr. Cooper of IATA specifically noted in 1953 at Rio (Rio Minutes, page 191), many of the members of IATA are governmental entities.

Like the *amicus* UK, the *amicus* IATA, at Rio in 1953 stood steadfast for the complete elimination of Article 3 of Warsaw and its provisions for any notice to international airline passengers. As its representative noted (Rio Minutes, page 53):

> "*Mr. Cooper* (IATA) stated that IATA was opposed to a revision of the Warsaw Convention for the present, but, if the Committee were to undertake any revision whatsoever, it must take into account the burden imposed on the carriers by the provisions on documents of carriage.
>
> There were three different interests involved in this matter:
>
> i) the interests of the public. In this regard, he drew the attention of the Committee to the comments of the International Chamber of Commerce which was certainly the most authoritative commercial organization in this field. The ICC was of the opinion that it would be unwise, at the present time, to attempt to revise the Warsaw Convention. If, however, it were decided to undertake a revision, the ICC considered that any amendments should be confined to a few essential points, and two of these points concerned the particulars to be included in the passenger ticket and the particulars to be included in the air waybill. The ICC suggested that details of the particulars to be included in the passenger ticket should not be included in the Convention which should also omit all details from the air

waybill leaving it to the carriers and users to evolve the exact form of this document in the light of commercial experience;

2) the interests of the great insurance companies. Everyone knew that transportation could not be carried on if insurance of the risks involved were not possible. The views of the insurers had been submitted to the Committee. The IUAI had pointed out that the regulations, which had come into force in the United Kingdom, in April 1952 and which applied the provisions of the Warsaw Convention to domestic and other international carriage, constituted a striking example of the way in which, with a minimum of amendment, the text of the present Convention could be brought reasonably up to date. In these regulations, the chapter of the Convention dealing with documents of carriage, had been to a great extent eliminated. The insurers of the world had pointed out that the decision taken by the British Parliament was sound and a perfectly proper way to expedite air transport;

3) the views of the International Air Transport Association, which represented the greater part of international air carriers. IATA had stated that the provisions of documents of carriage should be deleted from the Paris draft. If the Committee decided to amend the Warsaw Convention, it should delete provisions on documents of carriage.

If, nevertheless, the Committee decided to retain some provisions on documents of carriage, he hoped it would not require the delivery of an air waybill on acceptance of the goods. A shipper sent hundreds of packages at one time to an air company, and it was

practically impossible to issue several air waybills on delivery of every package.

He hoped, however, that the proposal of the United Kingdom for deletion would be adopted and that these very difficult clauses would be omitted from the revised Convention."

Mr. Cooper also stated the interest of IATA and its members in the low Warsaw limits at Rio:

"He pointed out that the limits had been fixed in 1929 and that, if any part of the transport activity of the world had increased, it was air transport and that, without the present limits, there would hardly have been the imposing record of increased use of aircraft by the public as passengers. The historical test could not be overlooked. The Warsaw Convention had been, with its limits of liability, a working rule under which air transport had increased immensely." (Rio Minutes, page 112)

Although IATA took the position that "any ticket at all" was enough under Warsaw Article 3(2), Mr. Cooper took note, even as far back as 1953 at Rio, that some lawyers did not agree (Rio Minutes, page 189):

"*Mr. Cooper* (IATA) was of the opinion that the Committee was considering one of the most difficult and one of the most important problems involved in the revision of the Warsaw Convention. A court had given a decision to the effect that, pursuant to the existing Convention, if any ticket at all were delivered, the obligations imposed by the Convention were complied with. Some lawyers did not agree with this principle and believed that, when a passenger ticket, as described in Article 3(1) had not been delivered,

the liability of the carrier was unlimited. Obviously, this matter had to be clarified, and it was evident that, if the second interpretation were adopted, the effect would be to impose on the carrier a penalty far beyond any justification, since it was provided that he could not only not take advantage of the limits, but also that he could not take advantage of the provisions excluding his liability," . . .

The foregoing Mr. Cooper, who, at The Hague in 1955 as Legal Adviser to IATA, served as an IATA Observer (Hague Documents, page 26), consistently took positions at The Hague similar to those maintained at Rio (Hague Minutes, passim).

Again, at Montreal in 1966, IATA maintained its previous positions as to the Warsaw Convention and as to "keeping down" limitations of liability. There, (Montreal Minutes, page 19):

"The IATA Observer indicated that the Association's first objective was to maintain the Warsaw Convention which, in its opinion, was a modern instrument. The second and the most important objective was to find a solution that would be generally acceptable to all parties to the Convention and the Hague Protocol. A further objective was to preserve the Warsaw system as a whole and to discourage any suggestion regarding alternative solutions. IATA was also interested in finding ways to meet the requirements of the large majority of cases—not necessarily all cases, but the average cases—to ensure the expeditious settlement of claims and to avoid the cost of litigation. The solution should entail reasonable cost so as not to hinder the normal development of civil aviation; it should safeguard the interest of the travelling public

as a whole and not merely one segment of it. Taking all of these objectives into consideration, IATA felt that the $50,000 limit agreed to by the airlines represented a reasonable and adequate solution. This figure, as the IATA Observer understood it, amounted in fact to a doubling of the average settlement of around $25,000 experienced by the United States in the year 1964.

Declaring that the figure of $100,000 proposed by the United States as the limit appeared to be unreasonable and unjustified, the IATA Observer indicated that his Association would not support it. He utilized data contained in a statement issued by the Air Transport Association of the United States in August 1965 (e.g., settlements in the U.S. during 1963 indicated no significant increase as compared with earlier experience, and the largest settlement in that year was $17,000) to show that the $100,000 limit could not be justified even in that country. He maintained that this high figure, if adopted, would encourage litigation, delay compensation payments and undermine the Convention. As regards cost—on the basis of the 50 cents per passenger figure suggested by the United States Delegate and an estimated total of 50 million passengers carried on scheduled and non-scheduled international flights in the year 1965, it would appear that at least some $25 million would be required of the airlines to pay for the experiment. Some airlines would probably have to pay more than others, and perhaps the smaller the airline, the bigger the share of payment, and all this would obviously be reflected in air fares."

IV.

Every Expression of United States Policy on the Warsaw Convention Has Clearly Stated That if the Carriers Do Not Give Passengers Adequate Notice of Warsaw Limitations, the Carriers Must Suffer Loss of the Liability Limitation. Since the United States Has Steadfastly Maintained That Passenger Notice Is Essential to Warsaw Limitation of Liability, It Cannot Be Claimed That the Decision Below Causes Surprise or Any Breach of International Understanding.

a. *In General*

The briefs submitted by *amici* ATA, IATA, United Kingdom, Italy and Canada seek to convey the implication that the decision below is, in effect, a breach of faith on the part of the United States, and therefore that the other parties to the Warsaw Convention had some kind of vested right to assume that the United States would never require passenger notice to support limited Warsaw liability. In effect, these a*mici* seem to imply that they have been relying upon such a United States position.

In point of fact, as shown below, the entire history of American policy expressions on Warsaw and related topics, is to the opposite effect. There has never been any U.S. policy other than requirement of passenger notice to support limited Warsaw liability, and therefore there could not possibly have been any reliance upon a contrary policy.

b. *U.S. Policy Statements at Rio*

The United States did not participate at Warsaw and so we must begin our consideration of U.S. expression of its position at the Rio meeting of 1953, where Mr. Calkins

of the Civil Aeronautics Board was the chief U.S. delegate. He spoke clearly, in objecting to any deletion of Article 3 of Warsaw, and as to the necessity of provisions in documents of carriage (Rio Minutes, page 54):

> "If it were left up to IATA to establish the contents of the documents of carriage, the carriers would be given a tremendous weapon which could be used to the disadvantage of the shipper and the passenger. Besides, IATA did not include all the international carriers.
>
> If it were left up to an international authority to establish the contents of the documents of carriage, it would cause grave constitutional difficulties in the United States, which could not adhere to a convention delegating the power to make laws to an international body. . . . in the documents of carriage, the carrier was obliged to notify the passenger or the shipper that this liability might be limited. The Delegation of the United States was of the opinion that the passenger ticket should contain the express provision that the carriage was subject to the terms and conditions of the Warsaw Convention which might limit the carrier's liability."

c. *At the Hague*

Mr. Calkins was also the chief American spokesman at The Hague in 1955. Here he repeatedly stressed the governmental policy position of the United States that an airline passenger must be notified, in a manner that he would understand, that if he flew on an "international" flight, the liability of the air carrier would be limited in amount. And notification in a manner that the passenger could comprehend meant notice in a type size that he could read and that would be discernible.

As to American preference for a "private" (recovery from the carrier) sanction, he said (Hague Minutes, page 81):

> "The system of sanctions set out in the present Convention was the most appropriate one, because it was based on the passenger ticket itself. The whole Convention was based on the passenger ticket; consequently, if the ticket did not contain the provisions that were required by law to be set out in it, then the contract did not, in fact, meet the requirements of the Convention. Under these circumstances, it was only just and equitable that the carrier should suffer the consequences. One might think otherwise if the danger to the carrier were really very great. But if the United States proposal for a form of advice to passengers were adopted by the Conference, the danger would not be very great. The form could be included in every ticket, and consequently, all that the agents of the carrier need do would be to fill out the ticket properly. This was not much to ask of the carrier in return for the reduced liability which the Convention accorded him."

He renewed the plea (Hague Minutes, page 128):

> *"Mr. Calkins* (United States) preferred to have sanctions imposed by private law rather than having them imposed by the various States under public law. The reasons for this preference were, first of all, that with a private law sanction there would be the possibility of applying a uniform sanction for non-compliance with the requirements of the Convention, and secondly, the policing of these sanctions would be made more easy. . . . In the case of private law sanctions, no heavy policing was required because, in the

event that no ticket was issued, the claimant had his remedy against the carrier. . . . He did not feel that the sanction should apply to the particulars concerning a place of departure and place of destination and the agreed stopping places. The passenger should certainly assume the obligations of seeing to it that the ticket issued to him set forth these places. However, the sanction should apply to the particulars concerning this notice."

Again and again, at The Hague, the United States hammered at the need for notice for the international passenger, in a comprehensible form, in print that would stand out, as a fundamental of American Policy. Mr. Calkins stated (Hague Minutes, page 60):

"Every State had the responsibility, not only for maintaining its air transport services, but for protecting its citizens and giving to those citizens a transportation service that was just and equitable. . . .

His Delegation felt, in regard to the notice requirement, that this requirement of the passenger ticket, the baggage check and the air waybill was the one requirement which really formed the crux of the whole difficulty. . . .

His Delegation proposed that Article III (a) of the Protocol—Article 3(1) of the Convention—should provide that every ticket sold by an international airline, or by any other airline, for that matter, should include the . . . provision:

'Advice to International Travellers' (in letters not less than ½ centimeter high)."

Also (Hague Minutes, page 61):

"It had been remarked that this notice was really unnecessary and that all citizens were presumed to

know the law. That might well be true in ordinary commercial affairs. However, it did not solve the problem in this case, since, in air transportation, domestic passengers travelled side by side with international passengers. In the ordinary course of commercial affairs and in day-to-day living, a person expected to be treated in the same way as other persons who were in the same group in a public transportation vehicle. Here, the matter was different. Persons on international carriage were subject to the Warsaw Convention; those confined to domestic transportation had the benefit, in some countries, of unlimited liability, which was much more preferable for the passenger than the limited liability of the Convention. As a result of this, States would insist on putting some kind of a notice requirement and on imposing it on international carriers coming into their territory. The result was that there would be a variation of law, a variation of requirements and there would be as many requirements as there were States. There might be as many decisions as there were courts, because the matter would be left up to the court."

Then (Hague Minutes, page 74):

"In addition to having a notice more or less in the same form as his Delegation had already proposed, he now proposed that the notice should be printed in a different coloured ink on the ticket so as to make it stand out."

"He disagreed with the opinion of Mr. Alten to the effect that the notice provision was worthless. To a certain extent, the value of the provision depended on the amount of internal carriage that went on in a country. There was a very great amount of internal carriage in the United States and the international

carriage was, perhaps, the exception rather than the rule. Consequently, the notice provision was extremely necessary for the United States, and also for other countries where internal transportation was highly developed. The provision jeopardized nobody and had the advantage that all transportation from a Contracting State to a non-Contracting State and back was covered by the Convention. Since almost all international air transportation was likely to be round-trip transportation, the notification, as recommended by the United States, did put the passenger definitely on notice that his rights to get a recovery would be limited."

Finally, Mr. Calkins likened the passenger, in accordance with American policy as to relationships between a carrier and a passenger, to the "man in the street," saying (Hague Minutes, page 116):

"he believed that it was desirable that the text be couched in a form which the man in the street or ordinary traveller could understand, without the use of legal terms that might be difficult to understand; the form of the text should also put the man in the street or passenger on notice that if he were taking a journey of a certain type, his rights against the carrier would be limited."

d. *United States Governmental Policies and Statements of Position, 1962-1963*

Frequently, in 1962 and 1963, the United States Government and various Departments and Agencies affirmed the strong American policy as to the necessity for notice of limitations of liability and as to adequacy and understandability of any purported notice.

In 1962, the United States Interagency Group on International Aviation ("IGIA") issued a report dated August 7, 1962, relating to the Warsaw Convention and the Hague Protocol, after the most extensive study of the subject ever made by the U. S. Government. One of the recommendations of IGIA was that air carriers be required to give "clear and positive notice of the limitations of liability article (Article 22) of the Warsaw Convention." Attached to said report were recommendations of various United States governmental departments and agencies, including the Civil Aeronautics Board, the Federal Aviation Agency, the Department of Justice, the Department of Commerce, the Department of Labor, etc. The recommendations of these departments and agencies are easily accessible and are contained in appendices to said IGIA Report of August 7, 1962, which is listed as "IGIA 23/1.10A." It is perfectly clear that as early as August, 1962, all the governmental agencies and departments involved reached the conclusion that the language then contained in international air carrier tickets did *not* give adequate notice of the limitations of liability in the Warsaw Convention.

The point was stressed by Senator Homer E. Capehart in comments on the Warsaw Convention which, on November 10, 1961, he addressed to IGIA (see Attachment No. 61 to IGIA 23/1.3) in the following language:

> "This is the most unconscionable provision in all our history ever to affect adversely all American citizens. There is absolutely no need for a provision of this nature, and the felony is compounded in that less than one-half of one percent of the passengers in international traffic are even aware of it."

Further, the IGIA Report stated that a passenger:

> "should be positively advised, when he buys his ticket or when he checks in, of the exact amount of the carrier's limitation of liability."

To give the gist of IGIA 23/1.10A, at page four of a letter from N. E. Halaby, Chairman of the International Group on International Aviation, to The Honorable Dean Rusk, the Secretary of State, dated August 3, 1962, the following language was used:

> "It is also recommended that in supplementary legislation United States air carriers be required to give clear and positive notice of the limitation of liability article (Article 22) of the Warsaw Convention and the extent of coverage under the automatic insurance plan. Thus each passenger intending to embark on carriage covered by the Warsaw Convention should be positively advised, when he buys his ticket or when he checks in, of the exact amount of the carrier's limitation of liability under both the Protocol (or the Convention) and the insurance plan. Such a passenger would then have the opportunity of buying at his own expense additional insurance according to his needs."

While there was considerable division among the IGIA member agencies on other phases of the IGIA Report, there was unanimity on the need for "clear and positive notice".

Shortly after the adoption of said IGIA report, counsel for *amicus Arnold Holtzman* wrote a letter on September 27, 1962 to Alan Boyd, then Chairman of the Civil Aeronautics Board, calling attention to this unanimous IGIA recommendation that clear and positive notice be required,

and requesting the C.A.B. to take action thereon. This letter is reproduced as Appendix A of this brief.

Following this letter, the C.A.B. took action, by issuing a notice of proposed rule making, Economic Regulations Docket 14411, dated April 1, 1963, dealing with Part 221 of the Civil Air Regulations, concerning the construction, publication, filing and posting of tariffs of air carriers and of foreign air carriers. The C.A.B. in this notice of proposed rule making, was giving notice of its proposed action as to the limitation of liability for death or injury of passengers under the Warsaw Convention. The first paragraph states:

> "Notice is hereby given that the Civil Aeronautics Board has under consideration a proposed amendment to Part 221 of the Economic Regulations that would provide for improved notice of limitation of liability for death or injury of passengers under the Warsaw Convention."

Thereafter, in the "Explanatory Statement" of some seven pages attached to the foregoing notice, it was stated, on page two:

> "The Warsaw Convention requires that the passenger be given a ticket containing a statement that the transportation is subject to the rules relating to liability established by the Convention. The carriers comply with this requirement by a notice in small print on the face of the ticket reading as follows: 'If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.' It appears

to the Board that this notice may be inadequate in two major respects: First, the ticket is by no means the most effective instrument for advising a passenger of a limitation of liability. There can be no assurance that a passenger will read his ticket at all or if he does, that he will read it under such circumstances as will enable him to realize the significance of the notice provision and take such protective action as his circumstances require. The type in which the notice is currently printed on the ticket is too small to alert the passenger to the importance of the matter. Second, the fact of greatest significance to the passenger, namely, the amount of limitation on liability for death or injury does not appear in the notice."

Then, on page four, the Explanatory Statement declares as follows:

"On January 22, 1963, the member carriers of the Air Traffic Conference of America (ATC) submitted to the Board for approval under §412(b) of the Federal Aviation Act of 1958, a resolution effective March 22, 1963, providing for an approved form of notice of the limit of liability of the Warsaw Convention, by means of a prescribed statement on a separate sheet of paper to be placed in the ticket envelope or attached to the ticket. (Agreement No. C.A.B. 16950)."

Thereafter, on April 1, 1963, the Civil Aeronautics Board adopted Order No. E-19447, referring to Agreement C.A.B. No. 10559, R-2, Docket No. 14411; and, on the second page of the order, it made the following remark and order:

"In the Explanatory Statement of the proposed rule the Board set forth reasons why it considers present means of giving notice of Convention liability limita-

tions inadequate. Insofar as applicable to the notice provisions now appearing in the ticket, the Board stated (1) the type in which the ticket notice is currently printed on the ticket is too small to alert passengers to the importance of the matter, and (2) that the monetary limit of liability for death, or injury does not appear in the notice."

Thus, because of the unsatisfactory nature of the then existing notice, the Civil Aeronautics Board in 1963 adopted this regulation (§221.175, Economic Regulations) which required air carriers and foreign air carriers to give more complete and adequate notice of Warsaw Convention limitations to passengers to and from the United States.

e. ***At Montreal Special Meeting of ICAO in 1966***

Following the United States denunciation of the Warsaw Convention in November, 1965, a Special Meeting of ICAO to consider limits for passengers under Warsaw and Hague was commenced at Montreal on February 1, 1966. The large American delegation was headed by Andreas F. Lowenfeld, and included Allan F. Mendelsohn, both then of the United States Department of State. Mr. Lowenfeld made it abundantly clear that the principal concern of the United States was the protection and welfare of American air line passengers.

In making a general opening statement, he said (Montreal Minutes, pages 5, 6):

"his country had already made clear its point of view: the Warsaw Convention or, to be specific, the limits of liability set forth in that Convention had outlived their time. The large attendance at the Meeting was testimony to the general recognition of the need to re-examine the Convention signed at Warsaw in 1929.

He agreed with the President of the Council that that Convention was an excellent compromise between the different legal systems of the world and fully justified as such. On the other hand, the compromise between the interests of the airlines and those of the airline passengers established by that same Convention was a questionable matter. The principal concern of the Government of the United States was to protect United States citizens of practically all economic levels who in ever-increasing numbers were making use of international air transport. The Meeting should bring up to date the compromise established in 1929 without, it was hoped, disturbing the legal regime underlying the Warsaw Convention. . . .

Speaking on the background of the issue before the Meeting, he briefly outlined the point of view of the United States. His country was mindful of the fact that the Warsaw Convention was one of the most widely accepted and most significant Conventions of private air law. It had contributed to the development of civil aviation and, to a certain extent, to the uniformity of interpretation and practice. However, it had been signed in 1929 at a time when international aviation had hardly emerged from the experimental stage and when it had to be protected from the risk of catastrophic accidents. Today, international aviation had become a vast business. Present-day technology had greatly reduced the risk involved in flying. The United States therefore considered that a Convention designed to tip the scales heavily in favour of the airlines to the prejudice of the passengers, was no longer justified. His Delegation believed that there should be a fair balance between the interests of air passengers and those of aviation.

Air safety was considerably greater today than in 1929, as confirmed by the accident rate of 0.61 passenger fatalities per 100 million passenger-miles. For the period from 1925-1929, the rate was 45 passenger fatalities per 100 million passenger-miles. There was thus no longer the same concern as in 1929 about the serious economic consequences one single air disaster might have for aviation.

The volume of air traffic had increased enormously with no sign of let-up. In 1964, 38 million passengers travelled on scheduled international air services, amounting to a total of 76 billion passenger-kilometres. Between 1925 and 1929, i.e. over a five-year period, airlines flew a total of only 400 million passenger-miles.

Regarding the cost of insurance, he commented that insurance companies were very reticent about giving figures. In his view, insurance costs were approximately 1% of operating costs, for example, on the North Atlantic. Assuming that these costs were to increase by 50% as the result of a liability limit of US $100,000 under the Warsaw-Hague system, there would be a consequential increase in operating costs of approximately 1.5%. The cost per passenger would rise approximately by $1.00 to $1.50 on a one-way trip from New York to London.

In respect of limits of liability, it had been said by some foreign Governments that the United States was seeking to impose its standard of living on all the other countries in the world. Nothing could be further from the truth. The United States did not interpret limits to mean the average compensation payable, because 'average' would mean that 50% of the persons involved had suffered damages. Only when a limit was as inadequate as that of the Warsaw Convention was there a tendency for it to be at an average level. . . ."

Resuming the argument (Montreal Minutes, pages 30, 31), he declared:

"Every victim of an accident had the right to equitable compensation. No matter what methods were used in the different countries or even by the various courts and administrative authorities within the same country, the aim was always the same: to determine the compensation for the financial loss suffered by the victim or, in the case of death, by the dependents. So far as possible, the financial indemnification was not intended to punish those responsible for the accident, but rather to restore to the dependents the financial circumstances which had existed before the accident. . . .

Non-Warsaw claims—The aforementioned Table shows that during the same period the average compensation per passenger had amounted to approximately U.S. $38,500. From 1958 to 1964, the average compensation had been around U.S. $52,500, a figure which should be borne in mind. The United States was not concerned with average compensation, but with the consequences of a limit. In other words, they were interested in the percentage of persons who, regardless of the limit, did not receive what was due to them as a result of the operation of the limit. If that coincided with the average, 50% of passengers would consequently be placed at a disadvantage. . . .

The effect of the raising of the insurance premium upon the overall operating expenditures of the airlines had been estimated for the year 1964 as follows: 64 cents per 1,000 passenger revenue miles; 80 cents per 1,000 of the latter at a U.S. $50,000 limit; 90 cents on the same calculation with a limit of U.S. $75,000; and 86 cents at a limit of U.S. $100,000. The difference of the cost of insurance between U.S.

$75,000 and U.S. $100,000 amounted to only 6 cents per 1,000 passenger revenue miles.

In conclusion, he stated that a) the Warsaw Convention was inequitable and constituted a burden which the United States could no longer impose upon its nationals and b) that the expenditure involved in the proposed new limit was altogether reasonable and would impose no heavy burden either upon the world's airlines or their passengers."

Again (Montreal Minutes, page 43):

> "the Delegate of the United States indicated that he realized that his country was only one among many, but having a great many airlines and a great many citizens travelling all over the world, his country must to some extent take its own interests into account. . . .
>
> Speaking to the references made to the generosity of the United States, he said that if airlines needed support, or countries needed support, there were ways to secure it. The United States did not believe that it could continue to ask in effect the widows and orphans of its citizens to assume this burden."

Also, as to the protection of the passenger (Montreal Minutes, page 60):

> "In his opinion, however, there was a difference between a race horse and a passenger. As he had already pointed out, the protection of the passenger was at the very core of the United States considerations."

In closing his remarks, and stressing the "famous small print purporting to give notice" of the Warsaw Conven-

tion and its limits, Mr. Lowenfeld stated (Montreal Minutes, pages 140-142):

"It is with considerable sadness that I have asked for the floor at this time. The United States delegation thought that it had come to Montreal well prepared with facts and with arguments in support of our position. We thought we had made a persuasive presentation for the proposition that the Warsaw Convention needed to be updated, and updated substantially. We believed, and still believe, that the United States proposal, or something close to it, would have been in the public interest. It would have secured justice for many persons, and at very little cost.

We thought that this Conference would recognize that commercial aviation is no longer an infant industry entitled to special shelter, but that it should be treated like other persons or businesses dealing with the public. In other words, we thought this Conference would recognize the principle that persons or firms engaged in international commercial aviation—whether airline, manufacturer, or ground control—should, on the whole, be held responsible for injuries done to others. . . .

We hoped until today that it might yet be possible to lay a firm foundation here for a successful diplomatic conference, and to work out an interim arrangement along the lines of this Conference's recommendations. If this had come about, our delegation had hoped to recommend to our government that it withdraw the United States notice of denunciation of the Warsaw Convention. It was not to be, and we are sorry.

But we should not, Mr. Chairman and fellow delegates, feel too sad. From the point of view of the

traveling public, there can be no doubt that this Conference has had a wholesome effect. All the countries represented here, and doubtless many others that will hear and read of the work of this Conference, have come to think hard about the question of the obligation of airlines toward their passengers. Nearly all countries have agreed—as every one of our exploratory votes proved—that the Warsaw Convention limits are obsolete and unfair. Whatever the timing, whatever the procedure followed, we may be sure that the Convention will be brought up to date or will gradually fade away. In the long run, the aviation industry, which has always been proud of its position in the forefront of human advance, will not—indeed cannot—stand still on the simple, and morally clear-cut issue of protection of its customers. . . .

So far as the United States is concerned, Mr. Chairman, let me state again that while we are disappointed that this meeting could not have reached a more clear-cut result, our impatience on the issue of compensation for accident victims is due only to our concern for the traveling public. . . .

We hope and expect that the uniform practices established in the light of the Warsaw Convention will be maintained—all, that is, except for the famous small print purporting to give notice of the applicability of the Convention and of the limits of liability contained therein. . . .

We expect that courts in the United States—and, accordingly, out-of-court settlements—will treat persons involved in air accidents like persons involved in any other accidents. Thus compensation will be based on the passenger's earning capacity, his life expectancy at the time of accident, and the degree of dependence of the survivors. There will be some high

settlements and some low ones, and there may well be some judgments in favour of the carriers.

Limitations on liability, whether statutory at the place of accident or by contract in the ticket, will almost certainly be disregarded on the ground that they are contrary to public policy. But you may be sure that foreign carriers will receive full justice in the United States. Further, where foreign residents bring suit in the United States, it will be the passenger's earning capacity, his life expectancy, and the status of his survivors in his own country, as well as that country's concepts of proper compensation for accident victims that will generally govern the result in the United States."

f. *In 1966 and 1967, Following Purported Withdrawal of the Denunciation of Warsaw in May 1966*

Following the purported withdrawal of the denunciation of the Warsaw Convention in May, 1966 and the creation of the so-called "Interim Agreement" by some of the international air carriers, there have been repeated strong statements of policy by the United States Government, and its Departments and Agencies, as to the absolute necessity of notice to an intending passenger of the applicability of Warsaw and of its limitations of liability, plus a notice in discernible and understandable form, not in fine print or type.

On July 14, 1966, Mr. B. T. Twigt, Secretary General of the International Civil Aviation Organization, (ICAO) distributed a letter concerning the Warsaw Convention. There was also distributed a copy of a proposed reply prepared by an *ad hoc* working group of IGIA. The proposed reply thus prepared by the working group of IGIA, was distributed by Mr. John H. Wanner, Consultant to

the Civil Aeronautics Board, to various persons, on or about September 6, 1966. On pages 8 and 9 of said proposed reply, appears the following matter:

"The United States recognizes that in certain other countries the problem of notice may not be as acute as it is in the United States. This would be particularly true in countries where almost all travel by the citizens of that country is in international air transportation subject to the provisions of the Warsaw Convention, or where by domestic law the Warsaw system of liability had been extended to cover domestic and non-Warsaw international travel as well. In the United States, however, and possibly in a number of other countries, the Warsaw system is not applicable to domestic transportation, and in such cases the liability of the airline is normally unlimited. Accordingly, if liability is to be limited for U. S. passengers in international, as distinguished from domestic transportation, adequate notice must be given. In this connection it should be noted that in the last few years courts in the U. S. have become increasingly strict in their application of the notice requirements of the Convention. The protection of the limits of liability have [sic] been denied to defendant air carriers in cases where, for example, the ticket and notice were not delivered to the passenger to make insurance or other arrangements, or where the notice was printed in fine type and failed to give proper notice. (The letter then states the following authorities—*Mertens* v. *Flying Tiger Line, Inc.*, (1965, C.A. 2 N.Y.) 341 F.2d 851, cert. den. 382 U.S. 816 (1955); *Warren* v. *Flying Tiger Line, Inc.*, (1965, C.A. 9 Calif.) 352 F.2d 494; and the trial court opinion in the instant *Lisi* case, (1966, S.D.N.Y.) 253 F.Supp. 237.)

Thus, the question of notice has recently become of greater importance to those airlines carrying Warsaw traffic to, or from, the United States."

(The foregoing language from the proposed letter was repeated verbatim on page 6 of the letter of September 6, 1966, signed by Nelson B. David, United States Representative, sent to Mr. Twigt. This latter was the final draft of the letter as approved by IATA for and on behalf of the United States.)

Attached to these papers, among other appendices, was an Appendix B, dated 4 May, 1966, from Montreal, which was a text filed by I.A.T.A. air carriers with the Civil Aeronautics Board of the United States, providing as follows, in paragraph #2, on pages 1, 2:

"Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention or the Convention as amended by the Hague Protocol and by the special contract described in paragraph #1 the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) the piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope: Advice to International Passengers on Limitation of Liability."

(Then follows the provision contained in the so-called agreement of May 16, 1966, whereby certain of the international air carriers agreed to raise the limit of liability to $75,000.00 per passenger.)

Subsequently, on September 19, 1966, the Civil Aeronautics Board gave notice of proposed rule making as to

Part 221, Economic Regulations Docket No. 17725, with respect to posting of notice of limitation of liability for death or injury of passengers under the Warsaw Convention. Attached to this notice of September 19, 1966, is another Explanatory Statement starting with page #3. On page #4 of this Statement, the following language appears:

> "By this agreement, the parties thereto bound themselves to include in their tariffs effective May 16, 1966, a special contract in accordance with the Warsaw Convention or the Hague Protocol providing for a limit of liability for each passenger for death, wounding or other bodily injury of $75,000.00 inclusive of legal fees. The parties further agree to provide in their tariffs that the carrier would not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of certain defenses. The carriers further stipulated that they would, at the time of delivery of the tickets, furnish to each passenger governed by the Convention or the Protocol and by the special contract described above, a notice in 10 point type advising such international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to in these special contracts pursuant to the Convention or Protocol as described above."

In the final draft IGIA letter of September 30, 1966, signed by Mr. David on behalf of the United States Government and sent to Mr. Twigt of ICAO, the following appears on pages 5, 6:

> "As to Question (4): *The inclusion of a provision concerning advice to international passengers on limitation of liability.*

The United States considers that the notice provisions of Article 3 of the Convention, and of the Convention as amended by the Hague Protocol, are inadequate, and that they should be amended so as to provide more effective notice to passengers. Experience in the United States demonstrates that many passengers on international flights are unaware of the applicability of the Warsaw Convention to their trip. The notice required by the Convention is usually printed in small type on the ticket, and, along with many other standard terms and conditions of the ticket, comprises material which the average passenger does not take the time to read. Moreover, even if the passenger does read the notice, it fails to state that a limit of either $8,300 or $16,600 may be currently applicable to him. Although more complete notice is now being given by carriers who are parties to the Interim Agreement, that agreement is an interim and voluntary arrangement only, and is not applicable to all carriers and all Warsaw transportation.

Because of the unsatisfactory nature of the existing notice, the Civil Aeronautics Board in 1963 adopted a regulation (Sec. 221.175, Economic Regulations) which requires air carriers and foreign air carriers to give more complete and adequate notice of Warsaw limitations to passengers to or from the United States. While many alternative forms of notice could be considered in lieu of the one adopted by the Board, we believe that some notice of this general character should be included. The form of notice incorporated in the Interim Agreement can also serve as a starting point."

On December 23, 1966, a draft of a "position paper" prepared by an IGIA working group was disseminated

for points of view in order to prepare the position that the United States would maintain at an ICAO meeting of a Panel of Experts on Warsaw limits to be held in Montreal on January 19, 1967. The draft was transmitted by Mr. John H. Wanner, Consultant to the CAB. At page 9, it stated:

> "Since the Interim Agreement is an inter-carrier, rather than inter-governmental, agreement, strictly speaking an ICAO meeting is not an appropriate forum in which to consider possible changes in the Agreement in order to remove or minimize any deficiencies which have been discovered in it. Nevertheless, no objection on this ground should be raised to any such suggestions, since the Panel meeting may well be the best forum to obtain an objective discussion of such problems."
>
> "There may also be complaint that the notice requirements under the Agreement are unsatisfactory, and indeed are chaotic. . . .[2]

[2] The airlines apparently are fearful that failure to give the notice required by the Interim Agreement may be deemed to be failure to give the notice required by Article 3 of the Convention, and thereby subject the carrier to unlimited liability."

After the Panel of Experts met, an ICAO "letter" known as ICAO-S-18/8-67/28, dated March 2, 1967, was sent, covering the work of the Panel on Warsaw and Hague limits of liability at their "First Session." Mr. Wanner had attended as a Member representing the United States. Attached as a restricted document was PE-Warsaw Report-1, 31/1/67. At page 4, ¶ 12, this Warsaw Report noted:

> "Views were strongly expressed in the Panel to the effect that the carrier should not be deprived of the

benefit of limits of liability merely by reason of some irregularity in the issuance of a ticket or of a notice to passengers. The requirements of Article 3 of the Warsaw Convention in regard to ticketing or notice are not unimportant, but they could be enforced by other measures, e.g., by a fine or a refund of the passenger fare in whole or in part. While this was the general view of the Panel, one member considered that such deprivation provisions were required in order to ensure compliance by the carrier with the notice requirements."

In ANNEX B, at page 9, the following points were examined:

"1) The combined effects of the U. S. Court decisions in the case of Mertens v. Flying Tiger Lines and Lisi v. Alitalia in conjunction with the waiver provisions of the Interim Agreement could result in absolute and unlimited liability for air carriers. The carrier which may have lost the limitation of liability for non-compliance with the notice requirement of the Warsaw Convention may also face the consequences of its contractual waiver of the defences under Article 20(1) of the Warsaw Convention. Serious consideration should therefore be given to a temporary amendment of the Interim Agreement as a matter of urgency so as to relieve the carriers of the waiver provisions in the Interim Agreement until the effects of the Lisi case on notice requirements under the Warsaw Convention can be clarified and satisfactorily resolved."

"3) Under the Interim Agreement claimants could recover up to $75,000 and use this sum for the prosecution of further proceedings against the air carrier

or third parties, unless the new limit is expressly made an alternative remedy leaving it to the election of claimants whether to proceed under the Interim Agreement or under the normal rules of the Warsaw Convention. This risk is accentuated by the combined effects of the *Lisi* and *Mertens* cases mentioned above."

And, same document, (page 10):

"7) The legal effect of a failure to give notice under the Interim Agreement is not clear. If the notice requirement is retained, consideration should be given to a provision that the failure to give the notice required by the Interim Agreement does not affect the carrier's liability under the Convention."

The next document is a draft, transmitted in a letter sent April 12, 1967, from the same Nelson B. David, United States Representative, to Mr. Twigt of ICAO, in response to the Twigt letter of March 2, 1967. This "draft" from Mr. David submits the comments of the Government of the United States. On page two thereof, Mr. David made the following significant observations:

"*Solution II.* This proposal, although somewhat similar to the present Interim Agreement between the airlines (Agreement CAB 18900), would not be acceptable to the United States in its present form in view of the numerous qualifications which have been proposed, such as elimination or restriction of the notice provisions and of Article 25, and the addition of exceptions to the rule of absolute liability. Only if the limits were raised substantially above those now stated in the proposal would the United States be willing to consider inclusion of any of such qualifications.

In the view of my Government, the notice provisions of the Convention and Protocol are of major importance, and require strengthening rather than weakening as suggested by the majority of the Panel. The reasons for this view are set forth in my letter of September 30, 1966, and need not be repeated here. Unless substantial parity is achieved between the levels of liability applicable to both foreign and U.S. domestic air transportation the need for notice to passengers embarking on international journeys will continue.

In this connection, we do not agree with the Panel's recommendation to weaken the notice provisions. It may be that a majority of the Panel believes that no notice provision can be made effective as a result of recent court decisions in the United States with respect to notice requirements. In our opinion, however, these instances in which it was held that the carriers failed to give adequate notice in fact serve to emphasize the need for greater effort on the part of the carriers rather than a need to weaken or eliminate the notice requirements of the Convention. Certainly we do not agree that these decisions have rendered provisions on notice unnecessary or meaningless."

There ensued another letter from Secretary General Twigt of ICAO, dated August 2, 1967, transmitting the "Second Report" of the Panel of Experts after the Panel had held its second session from 4 to 18 July 1967. This letter is S 18/10-67/145. Attached thereto was another restricted document, another Report of the Panel, known as PE-Warsaw Report-2, 18/7/67. Mr. Wanner had again attended the Second Montreal Session of 1967 as the United States Member of the Panel. A number of statements showing the steadfast position of the United States on notice are contained in this Report of the second session.

First, in order to appreciate the United States position, one must know the proposed revisions suggested by the Panel. The Panel's revision as to notice is contained in ¶ 7 on page 3 of the Report:

"7. The following features will be common to both Solutions I and II as revised at this session:

(1) *Notice:*

Article 3 of the Warsaw Convention as amended at The Hague should be so revised as to eliminate any possibility that the carrier would lose his limitation of liability because of non-delivery of ticket or notice or any other defect in the documents of carriage. Reasons for this view are stated in Annex 1 hereto."

Part of the United States rejoinder is contained on page 5:

	Exclusive of Costs	*Inclusive of Costs*
"Solution I	US $ 75,000	US $100,000
	37,000	50,000
Solution II	58,000	75,000
	33,000	43,000

8.1 In specifying the limits applicable to Solution I, the Panel bore in mind that any amount exceeding $100,000 would be unlikely to be acceptable to a large number of States.

8.2 The Member from the United States of America pointed out that the comments from his country indicated that the benefits to passengers under international and U.S. domestic rules and limits of liability should be approximately equivalent before elimination

of the notice requirements of the Convention could be considered. In view of the Panel's recommendations concerning notice (see paragraph 7(1) above and Annex 1) he felt that the limits of liability recommended by the Panel might be too low for acceptance by the United States."

In ANNEX 1, at page 9, the Panel noted:

"1. Article 3 of the Warsaw Convention provides that if the carrier accepts a passenger without a ticket having been delivered he shall not be entitled to avail himself of the provisions of the Convention which exclude or limits his liability. In one country the courts have interpreted this as meaning that the carriar is not entitled to avail himself of the limits if the ticket delivered does not give adequate and timely notice of the fact that the Convention applies to the carriage."

Again, the 1967 American refutation (pages 9, 10):

"5. Contrary to the views stated above, the Member from the United States of America was of the opinion that notice is needed in countries were the Warsaw/Hague system is not applicable to domestic air transportation and where the liability of carriers is generally unlimited. In the United States of America, for example, a very substantial number of people travel frequently on domestic journeys, but quite infrequently on international journeys. Unless substantial parity is achieved between the levels and rules of liability applicable to both foreign and U.S. domestic or air transportation, the need for legible, intelligible and timely notice will continue, so that such passengers will be aware of the exceptional liability limitations

for international journeys and can take appropriate measures to offset their impact.

5.1 The Member from the United States of America considered that past experience demonstrated the need to continue the sanction of the loss of limitation of liability in order to ensure compliance by the carriers with the notice requirements."

As this Court already knows, the Solicitor General of the United States, in his memorandum filed herein, has supported the holdings of the two courts below.

Therefore, we respectfully conclude that the consistent, unswerving and undeviating position of the United States, and all of its departments and agencies has been that the notice contained in the *Lisi* ticket is completely inadequate to bring to the attention of United States' passengers on international flights, the limits of liability and related provisions of the Warsaw Convention, and that the absence of adequate notice results in a loss of the carrier's limitation of liability.

g. *American Public Policy on Carrier Liability Limitations*

Under the law (admiralty and maritime) of the United States, and under the law of the individual states of the United States, it is against public policy for a common carrier of passengers to limit, or to attempt to limit, the amount of the carrier's liability for personal injury or death of passengers incurred through negligence or other tortious conduct. See: 14 Am Jur 2d, CARRIERS, §§ 942 et seq.; 13 CJS, CARRIERS, §§ 629 et seq.; 80 CJS, SHIPPING, § 195 a; 7 New York Jur, CARRIERS, §§ 399 et seq.

With respect to air carriers, the annotation in 13 ALR 2d 340, 341, indicates that any attempted limitation of its

liability to a passenger by an air carrier, by inserting a provision to that effect in the passenger ticket,

"is contrary to public policy and void. Allison v. Standard Air Lines, Inc. (F DC Cal) [1930] US Av 292, affd (CA9th) 65 F2d 668, [1933] US Av 92; Law v. Transcontinental Air Transport, Inc. (F DC Pa) [1931] US Av 205; Curtiss-Wright Flying Service, Inc. v. Glose (CA3d NJ) 66 F2d 710, [1933] US Av 26, 228, cert den 290 US 696, 78 L ed 599, 54 S Ct 132; Conklin v. Canadian-Colonial Airways, Inc., 266 NY 244, 194 NE 692, 38 NCCA 186, [1935] US Av 97, affg 242 App Div 625, 271 NYS 1107.

The American common-law policy of barring a common carrier of passengers from limiting or extinguishing its liability for negligence by contract with the passenger was followed in Curtiss-Wright Flying Service, Inc. v. Glose (CA3d NJ) 66 F2d 710, [1933] US Av 26, 228, cert den 290 US 696, 78 L ed 599, 54 S Ct 132, which excluded the air carrier's attempted limitation of damages to a stated sum, by provisions printed on the passenger ticket covering a seat in an airplane which crashed through the alleged negligence of its pilot, causing the death of its lone passenger. Calling attention to the practice of excluding such limitations in connection wtih land and water transportation, the court stated: "All alike perform the same service, viz., transportation. They are competitors for the same class of business. Every passenger carried by airplane means a passenger less for the railroad or the steamship. Transportation, as its derivation denotes, is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing-done are identical in result. Since, then, the three stand as, in substance, the same, it re-

mains to inquire whether the defendant was a common carrier, for, if it is, its attempted limitation of an injured passenger to recover full compensation for loss due to its negligence is invalid." The court then went on to point out that an air carrier's holding itself out to the public as performing the things done by a common carrier and its solicitation of the patronage of the traveling public, its advertising of schedules or routes, times of leaving, rates of fare, and its establishment of general rules and regulations, all clearly indicated that it held itself out as a common carrier of passengers and came in direct competition with rail and steamship lines."

We again point out the contrast between American and British law and public policy in regard to this important issue. As was noted in *Oceanic Steam Nav. Co. v. Corcoran* (1925, CA2 NY), F2d 163, 57 ALR 163, at page 168:

"In England, however, a different rule prevails, and it is there settled that a public carrier may exempt itself from liability for its own or its agents' negligence. Henderson v. Stevenson, L. R. 2 H. L. Sc. App. Cas. 470; Parker v. South Eastern R. Co. L. R. 2 C. P. Div. 416—C. A.; Richardson, S. & Co. v. Rowntree [1894] A. C. 217—H. L.; Price v. Union Lighterage Co. [1904] 1 K. B. 412, 6 B. R. C. 119—C. A.; Pyman S. S. Co. v. Hull & B. R. Co. [1914] 2 K. B. 788; Baxter's Leather Co. v. Royal Mail Steam Packet Co. [1908] 2 K. B. 626—C. A.; The Marriott v. Yeoward Bros. [1909] 2 K. B. 987; Cooke v. T. Wilson, Sons & Co. (1915), 85 L. J. K. B. N. S. 888; Hood v. Anchor Line [1918] A. C. 837, 849, 9 B. R. C. 1097—H. L.; Charles Wade & Co. v. London & N. W. R. Co. [1921] 1 K. B. 582; Jones v. Oceanic Steam Nav. Co. (1924) 40 Times L. R. 847, 849."

This British notion of freedom of the passenger to contract away his right of recovery has been carried over, at least in a Canadian case affirmed by the Privy Council, to relationships between an air carrier and its passengers.

In conformity with English law the Canadian Supreme Court in Ludditt v. Ginger Coote Airways, Ltd. [1942] Can SC 406, [1942] 4 DLR 353, [1942] US Av 178, held that a licensed air carrier of passengers may contract out of liability for personal injury to its passengers. The suit was based on personal injuries and loss of baggage caused by defendant's negligence while the plaintiff was a passenger in a plane making a regularly scheduled flight from Vancouver to Zeballos. While the court expressly stated that in Canada "under the existing law and statutes, a carrier of passengers can contract out of the liability which attaches to him, by the use of apt words in the contract or ticket which he issues, provided the conditions for making them binding have been duly complied with," it should be noted that the Supreme Court did not, as appeared in the Court of Appeal decision of the same case, decide whether the air carrier in the present case was a common carrier or not, but was content to base its judgment on the ground that, under the Canadian Transport Act of 1938, the Board of Transport Commissioners may allow the issuance of tickets limiting liability, if it appears that the proper procedure is followed.

On appeal to the Privy Council, the English court of appeals, in upholding the Canadian court, emphasized that although at common law a common carrier of goods was virtually an insurer of the goods and liable at all events except for "acts of God, and of the enemies of the King," the carrier of passengers was only required to carry with due care, and that the common-law freedom to contract was not taken away from carriers of passengers by such

statutes as the Railway and Canal Traffic Act, 1854, which referred to railroad common carriers of goods, or the Dominion Transport Act, which involved a code of provisions relating to traffic, and to tolls and tariffs, to which all licensees under the act must adhere. [1947] AC 233, [1947] 1 All Eng 328, [1947] US Av 1.

V.

In Addition to the United States, Other Participating Governments at Warsaw, Rio and The Hague Evinced Concern for the Passenger. They Noted the Inequality of Bargaining Positions of Airlines and Passengers; Noted the "Adhesion" Nature of the Contract of Carriage; and Supported the Principle That Airlines Would Lose Their Liability Limitation if They Did Not Give Notice to the Passenger.

a. *At Warsaw*

In 1929 at Warsaw, at least some of the participating governments voiced concern for the welfare of international air line passengers and profound interest in their protection. The inequality of the bargaining positions; the nature of the contract of carriage as a contract of adhesion; and the need for notice in order to avoid loss of liability limitation, were articulated frequently.

At the very outset, at Warsaw, the Rapporteur, M. deVos of Belgium (Warsaw Minutes, page 13 et passim), noted the importance of the sanction in protecting the passenger or the shipper. In referring to the work of the Comité International Technique d'Experts Juridiques Aériens ("CITEJA"), he declared (Warsaw Minutes, page 15), as to the passenger ticket and other documents:

> "La chose essentielle, à cet égard, est la sanction, sanction prévue pour les trois documents et qui con-

siste à retirer au transporteur qui transporterait des voyageurs ou des marchandises sans documents ou avec des documents non conformes à la convention, le bénéfice des avantages prévue par la convention."

This may be translated as follows:

"The essential thing, with regard to this, is the sanction, sanction provided for the three documents and which consists in withdrawing from the carrier who would transport passengers or goods without documents, or with documents not in conformity with the convention, the benefit of the advantages provided by the convention."

M. Sabanine of the U.S.S.R. (Warsaw Minutes, page 27), noted:

"Au point de vue économique, au point de vue des relations existantes entre le transporteur et le transporté il n'y a pas d'autre moyen de transport, où l'inégalité entre ces deux Parties au contrat soit plus grande. Déjà le fait même du transport aérien, le fait que l'avion vole, mais ne rampe pas sur terre avec une lenteur déconcertante, agrandit la distance entre les rapports juridiques du transporteur et du transporté. Il faut remarquer ensuite que nous connaissons tous la structure des grandes compagnies d'aéronavigation qui, ou bien dans certains pays sont des compagnies d'Etat ou bien nonobstant leur caractère privé au point de vue formel, sont très prochement liées avec les milieux gouvernementaux et donc sont très influentes et économiquement fortes. Dans ces conditions nous sommes obligés d'appuyer très fortément l'opinion qu'une décision de la présente Conférence, comme quoi les cadres de l'exonération eventuelle du

transporteur deviennent trop larges, serait inéquitable et pourrait influencer négativement le développement des transport aériens au point du vue de leur fréquence. Or, qui de nous désirerait un pareil résultat."

"Si au commencement de ce siècle on parlait encore du droit aérien avec trop de détails en comparaison avec l'état de la technique de l'aviation, maintenant ce serait une faute de sous-estimer les possibilité de sécurité et de commodité, dont dispose et dont disposera de plus en plus le transport aérien et de quitter pour cette cause la voie habituelle et normale de la responsabilité du transporteur, surtout si on estime la grande prépondérance économique et politique qui est du côté de celui-ci."

Translation of the foregoing follows:

"From the economic point of view, from the point of view of the existing relations between the carrier and the traveller, there is no other means of transportation where the inequality between the two parties to the contract are greater. Already the very fact of air transportation, the fact that the plane flies, but does not creep on earth with disconcerting slowness, widens the distance between the juridical relations of the carrier and the traveller. One must note further that we all know the structure of the large air navigation companies which in certain countries are either state companies, or in spite of their private character from a formal point of view, are very closely bound to the governmental circles, and are therefore very influential and economically strong. In these conditions we are obliged to support very strongly the opinion that a decision of the present conference whereby the framers of eventual exoneration of the carrier become too wide, would be inequitable and could nega-

tively influence the development of air transportation and from the viewpoint of their frequency. Now, who among us, would wish such a result?"

. . . .

"If at the beginning of this century one still spoke of air law with too much detail in comparison with the state of the technique of aviation, now it would be a mistake to underestimate the possibilities of security and comfort at the disposal, now and forever more, of air transportation and to leave, for this reason, the usual and normal path of the liability of the carrier, especially if one values the great economic and political preponderance which is on his side."

Such juridical thoughts as to the protection of the travelling public were strenuously voiced from non-communist sources as well. Thus, the spokesman for Switzerland (Warsaw Minutes, page 103) stated:

M. PITTARD—(Suisse)—"Nous devons donner au public des règles qu'il connaisse. Si vous dites: c'est une question entre les compagnies de navigation aérienne et le public, au point de vue administratif, c'est très simple, mais tous les juristes vous diront: nous devons éclairer le public, il ne faut pas qu'il soit obligé d'aller trouver les compagnies de navigation aérienne pour leur demander: comment faites-vous? Le public ne va pas aller trouver la compagnie de navigation aérienne pour luit dire: donnez-mois vos conditions générales, que je voie si je suis protégé!"

Translation ensues.

"We must give the public rules that it knows. If you say: it is a question between the companies of air navigation and the public, from an administrative

point of view, it is very simple, but all jurists will tell you: we must enlighten the public, it should not have to go to the companies of air navigation to ask them: how do you do it? The public is not going to go to the company of air navigation to say: give me your general conditions, so that I can see if I am protected."

We have already noted, above, the observations of Signor Giannini on behalf of Italy (Warsaw Minutes, page 32). For convenience, we repeat the translation:

"In these conditions, when we find ourselves facing organized interests like those of the ship owners and of non-organized interests, like those of the passengers, we feel that the latter should not be forgotten, otherwise we do not have the harmony of interests which must be guaranteed.

"Consequently, as general directives of the Italian Delegation I must say that we are not prepared to accept any measure of favor or of particular indulgence toward the ship owners. This means that for what touches the interest of air navigation, that is of national interest, yes; for what is privilege or favor, no."

Also, in discussing another article, Signor Giannini (Warsaw Minutes, page 66), pointedly remarked: "Dans cet article comme pour les autres, la Délégation italienne estime que tout ce qui constitue pour le transporteur aérien un privilège exagéré ne doit pas être accepté."—"In this article as in the others, the Italian delegation considers that everything that constitutes an exaggerated privilege for the air carrier must not be accepted."

M. Pierre Flandin, for France (Warsaw Minutes, page 28), declared:

"Il est clair que nous devons, dans une convention qui tend à être universelle, établir des règles qui soient une garantie, qui constituent une garantie pour l'usager et ce serait, à mon sens, commettre une grave erreur que de considérer qu'une législation comme celle que nous voulons créer doit être adaptée seulement aux conditions actuelles du moment: il faut tenir compte de l'évolution probable d'un moyen de transport tout nouveau, des garanties de sécurité de plus grandes qu'il offrira et ne pas créer à son encontre une différence trop grande qui inciterait l'usager, soit le passager, soit le commercant qui confie des marchandises au transporteur, à ne plus emprunter la voie aérienne, parce qu'il serait moins garanti que sur les autres voies. Or, parallèlement à une législation rsetrictive de la responsabilité comme celle dont je viens de parler à l'instant, que s'est-il passé dans les pays?"

The translation:

"It is clear that we must, in a convention which tends to be universal, establish rules which should be a guaranty, which constitute a guaranty for the user, and it would be, in my opinion, to commit a grave error were we to consider that a legislation like the one we want to create be adapted only to actual conditions of the moment; one must take into account the probable evolution of an entirely new means of transportation, of the guaranties of security, larger and larger, that it shall offer, and not create against it too large a difference, which would induce the client, either the apssenger, or the businessman who entrusts his merchandise to the carrier, not to use the airways, because he would be less covered than by other means of transportation."

b. *At Rio*

Expressions of concern for the passenger, stressing the inequality of his position, abounded at the Rio Meeting in 1953. The Delegate of France, M. Garnault, (Rio Minutes, pages 174, 175) stated:

> "Article 3(1) of the Working Group's text provided that the passenger ticket must include a statement to the effect that the carriage was subject to the rules relating to liability established by the Convention. This was an essential provision. The contract of carriage was, particularly in regard to the passenger, a "contrat d'adhésion" the terms of which could not be discussed. The passengers were not familiar with the detailed provisions governing their travel by air. The least that could be told to them was that they were travelling under a system of limited liability, and not under a system of complete liability, as would be the case under the majority of legislations governing other modes of transport. If they did not receive this notice, they would risk being deceived in regard to the conditions under which they were taking the risk of a trip by air, and this was a serious matter. The French Delegation felt that there should be a particular in the ticket concerning, at least, the provisions of the Convention which limited the liability of the carrier. It also felt that a sanction should be applied to the carrier in the case of the omission of this particular, and this sanction should be that the carrier could not claim limited liability, because it left the other party to the contract in ignorance as to the existence of limited liability."

Later, specifically referring to the "sometimes small print" used by the international air carriers in their passenger tickets, he added:

"Mr. Garnault (France), replying to Mr. Cooper (IATA), pointed out that if the French Delegation sacrificed logic, it did so in order to take into account the practical facts of the problem. The passenger who took an aircraft received a ticket which included numerous particulars, which a person would not be tempted to read unless he were suing on them, but what could be observed was that, in spite of the sometimes small print, these causes were perfectly studied by those who worked for the carriers, so much so that everything having been prepared and written, one could not possibly be deceived and it was hardly likely that the servants or agents would commit blunders.

The practical difficulty which the proposals of Canada and France wished to overcome was to draw the attention of the passenger to the fact that he was subject to special rules of liability which determined his rights. It would even be necessary that, in the future, it be brought out in a better way on the passenger ticket that the ticket was a contrat d'adhésion, for, otherwise, the passenger might not take out supplementary insurance if he did not know that he was travelling under rules providing for limited liability. The French Delegation, therefore, asked that the liability of the carrier be unlimited, as was the case for an ordinary carrier carrying out transport under common law rules, when it was not shown on the passenger ticket that the carriage was subject to the rules relating to liability established by the Convention."

At a still earlier session of the Rio meeting, The French Delegate, noting that the contract of carriage was a contract of adhesion, had stated (Rio Minutes, page 54):

"The formalities with which the contract of carriage should be accompanied had the aim of enabling the

parties to this contract to prove its contents. On the other hand, it could not be admitted that, in a *contrat d'adhésion,* the carrier could be free to define the form of this contract."

c. *At the Hague*

Concern for the passenger's welfare and for giving him information as to his rights predominated at The Hague in 1955. In addition to the ideas articulated by Mr. Calkins on behalf of the United States, discussed above, delegate after delegate stressed the need for complete enlightenment of the air travelling public. Mr. O'Connor of the Ireland Delegation argued often and strongly, among others.

Thus (Hague Minutes, pages 69, 70), Mr. O'Connor said:

"it seemed inevitable that the interest of the public must at least slightly predominate, if only for the reason that the public was normally less better informed in matters of this kind than the airlines. Therefore, he had voted against the entire deletion of Articles 3 to 11, which would leave the position wide open. In the event of deletion, no matter what good intentions the airlines might have, it seemed inevitable that the public might suffer."

"What was the position of the passenger, who knew nothing whatever about the conditions of liability? Normally he might wish to cover himself in some manner additional to the coverage provided by the Convention. Consequently, it was essential that the passenger should be given some information as to the situation. It seemed absurd to his Delegation to suggest that such information could be conveyed by saying on the ticket that the Warsaw Convention, if it covered

the journey, applied to the journey. Yet, this was an interpretation of the suggestions which had been made in the Conference concerning the notice. It should not be beyond the capacity of, say, ICAO and to some extent of IATA to aid in the dissemination of the information. His Delegation was attracted by the United States proposal, which seemed to attempt to tell the passenger most of what he wanted to know."

"It had been stated that it was ridiculous to apply to a simple omission the sanctions which were already applied in the Convention in the case of wilful misconduct. But, when an omission left the passenger completely in ignorance of his position, the situation was, if not quite as bad as in the case of wilful misconduct serious for the passenger. Consequently, the sanctions should apply in the case of such an omission. It had been said that the sanction was harsh because the term 'wilful misconduct' must necessarily apply to something of a very high order for unlimited liability to apply. But, this was not so, because the Courts of the country concerned would decide what the actual liability would be and the liability so determined must be taken to be reasonable."

Then, at page 122, he continued:

"in the case of the notice, in order to establish a fair balance between the public interest, as represented by the passengers, and the private interest, as represented by the carriers, one had to weigh the balance a little in favour of the passenger who was in an inferior position in relation to the knowledge of the law governing the carriage. The proposals before the meeting merely paid lip-service to the principle that the passenger should have knowledge of the Conven-

tion. These proposals tried to make the passenger aware of the existence of the Convention, but made no effort to tell him what the Warsaw Convention covered, or in what circumstances it would operate. Only the United States proposal attempted to go a little in that direction."

Mrs. Zalka of Hungary (Hague Minutes, page 58) noted "the interest of the passengers, which was an interest which the Convention should defend, since this was an interest of the citizens of the States who were represented at the Conference."

M. Garnault noted, on behalf of France (Hague Minutes, page 88):

> "The Convention applied especially to the extent that it implied on the part of the passenger, the acceptance of a regime of limited liability of the carrier. When this element was not included in the contract of carriage or was not sufficiently brought out in the contract, the consent of the parties was to that extent not manifest on the question of limitation of liability. In that event there would be a return, at least in certain countries, to a common law solution whereby the carrier was entirely liable to give compensation for damage caused during the carriage."

He then went on (Hague Minutes, page 126):

> "The non-inclusion of a provision for sanctions would be even more curious in view of the fact that the Observer from the IUAI had pointed that if the sanctions were not included, the Courts might perhaps, apply them. The sanction should apply in cases where there was a flagrant neglect on the part of the carrier to give a notice to the passenger."

The delegate from Spain, Señor Gómez Jara (Hague Minutes, page 90) spoke straight to the point:

> "it was entirely natural and logical that the Convention should include a sanction of unlimited liability when the passenger was not given notice that the carriage in question was subject to a regime of limited liability. It was entirely natural that the Convention should include a procedure to ensure that the ticket would contain the fundamental condition to the effect that the carriage was subject to a limitation of liability. The basis of the Warsaw Convention was to give the carrier the benefit of the limitation of liability."

. . . .

> "Other speakers, including Messrs. Calkins and Garnault, had said that the Warsaw Convention had a contractual basis and that in this contractual basis had to be included the fundamental condition or purpose of the Convention which was the limitation of liability. If the Convention reduced the rights of the passengers by a limitation of liability, it was absolutely necessary that, at the time the contract was entered into, the passenger know that there might be this limitation of liability."

He reiterated (Hague Minutes, page 129):

> "The fundamental element of the Convention was that it restricted the rights of the passenger by limiting the liability of the Carrier. Therefore, it was only just and logical to draw the attention of the passenger to the possible limitation of the carrier's liability."

VI.

The Position of Air Carriers Has Completely Changed Since the Fledgling Days of 1929, and the Warsaw Convention Must Be Considered in Light of Modern Prevailing Conditions.

a. *The Radical Changes Since 1929*

The position of air carriers in the 1925-1929 period is described in "The United States and the Warsaw Convention", by Lowenfeld and Mendelsohn, in 80 Harvard Law Review. The authors recite the following facts (80 Harvard L Rev at page 498):

> "The Warsaw Convention[2] was the result of two international conferences held in Paris in 1925 and Warsaw in 1929, and of the work done by the interim Comité International Technique d'Experts Juridique Aériens (CITEJA) created by the Paris Conference. Civil aviation at that time was still in its infancy. The total airline operations in the five-year period 1925 to 1929—in domestic as well as foreign travel—was only 400 million passenger miles. The fatality rate was 45 per 100 million passenger miles.[3] The larger airlines could carry 15 to 20 passengers at cruising speeds of about 100 miles per hour and over stages of about 500 miles. The most advanced and popular United States aircarft, the Lockheed Vega, which carried six passengers and a pilot, had a cruising speed of about 120 miles per hour and a range of about 550 miles. Though the airplane had been invented at roughly the same time as the automobile, its coming

[2] 137 L.N.T.S. 11 (1929).

[3] This compares with the rate of 0.55 fatalities per 100 million passenger miles in 1965. 1965 ANNUAL REPORT OF THE ICAO COUNCIL TO THE ICAO ASSEMBLY 13.

of age as a common means of transportation lagged at least a generation or more behind. Still, by 1929, international civil aviation was on the threshold, and the planners at Warsaw were prepared to look ahead."

Then, after discussing the casual mode of adherence by the United States to Warsaw (80 Harvard L Rev. at page 502) " . . . . the President submitted the Treaty to the Senate, and on June 15, 1934, without debate, committee hearing, or report, the Senate gave its advice and consent by voice vote. The United States deposited its instrument of adherence on July 31, 1934, and the President proclaimed the Treaty ninety days later."), the authors, in examining the debates concerning revision of Warsaw that started almost immediately, noted, with citation of authority even including Major Beaumont, at 80 Harvard L. Rev. page 504,

"And some persons suggested that there was no longer any reason to accord special protection to airlines, or at least the degree of special protection that was required in 1929.[26]

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[26] *See, e.g.,* Beaumont, *Liability of International Air Carriers,* 97 L.J. 643 (1947); Rhyne, *International Law and Air Transportation,* 47 MICH. L. REV. 41, 54-61 (1948)."

Hence the steadily improving position of air carriers engaged in international flights was noted even in the 'thirties and in the 'forties.

After mid-century, the United States repeatedly stressed how different from what it was in 1929, and how improved, financially and otherwise, was the status of these air carriers. At Rio in 1953, the Delegate of the United States remarked:

" . . . aviation had become sufficiently of age so as no longer to require special treatment to the degree that

was now accorded it by the present limits of liability. There was a tremendous difference in the state of aviation in 1929 and its state today. The amount of traffic carried in 1929 was almost insignificant. He had no information as to whether insurance could be obtained at that time. He believed that most life insurance policies, at that time, excluded all aviation risks as a matter of common concern and that it was almost, if not entirely impossible, for airlines to obtain insurance. Consequently, in 1929, it was very necessary for the development of international aviation generally, to accord it a special privilege that would enable it to develop and, at the same time, limit the risks to an amount which aviation at that time could pay.

In comparison with that early period, aviation had today, definitely become of age. The risks of air transport were very close to those of surface transport. In domestic United States transportation over the period of last year, the rate per 100,000,000 passenger miles was identical to the death rate over the preceding three years of transportation by rail, that is, the figure of 35 persons killed per 100,000,000 passenger miles. . . .

Again, to give further statistics in regard to the development of aviation, he stated that more passengers had come by air to the United States ports during the course of a year than had come by ship. Last year, the airlines of the United States operating domestically had carried 25% more passengers than had been carried by first-class rail, and, even taking in all rail transportation, the amount of passenger traffic in the United States amounted to 40% of the total traffic by rail.

Financially, equally great strides had been made. It was a matter of interest that, of all the carriers in the United States, whether bus, road, railroad, sea or air, the three leading carriers from the point of view of gross passenger revenues had been the airlines. That was a remarkable record which indicated complete acceptance of this method of transportation."

We have noted elsewhere the strong statement by the United States Delegate at the 1966 ICAO meeting in Montreal (Montreal Minutes, pages 5, 140) about the potent later-day position of the air carriers. But the United States was not alone in recognizing this factor at Montreal. Witness the observations of the President of the ICAO Council (Montreal Minutes, pages 1, 2):

"When the Warsaw Convention and The Hague Protocol were prepared, one of the most important, for the establishment of the limits of liability, was the need to protect the air transport industry. The situation has changed in the sense that air transport could today hardly be called an infant industry. The economic situation of many airlines is very solid and the size of their operations is impressive: • • • •

At the same time, the ever-increasing number of air passengers requires that more attention be given to the public. There are many who feel that both at Warsaw and at The Hague, the predominant voice was that of the air carriers and that the passengers were not well taken care of.

In this gathering of delegates from Governments, there is no need to emphasize that the travelling public must be adequately protected. Adequately means not only a reasonable financial compensation but a system that will permit receiving that compensation with a minimum of delay."

The Delegate of the Republic of China (Montreal Minutes, page 22) agreed:

> "The situation today has changed from that in 1929 or 1955 when it was necessary to protect the air transport industry at its infant stage."

So did the Delegate of Belgium (Montreal Minutes, page 146):

> "Through its developing techniques, civil aviation has become a safe and economical means of transport which can no longer claim the protection which is very rightly granted to infant industries."

b. *The Warsaw Convention Must Be Construed as a Whole in the Light of Presently Existing Conditions of International Air Travel*

Because most of the foreign and domestic air carriers are amenable to jurisdiction and venue in New York, the great bulk of the litigation and of the reported decisions about the Warsaw Convention has stemmed from the federal courts and the state courts in and of New York. The District Courts for both the Southern and Eastern Districts of New York are thoroughly versed in the ways of Warsaw, as is their direct appellate reviewing tribunal, the Second Circuit. Equally knowledgable and experienced in dealing with this Convention is the New York Court of Appeals. We respectfully urge to this Court that the considered judgments of these tribunals are entitled to great weight in determining Warsaw construction problems such as the one presently before this Court—the first time, by the way, that the Warsaw Convention has ever had, here, a full-scale review on the merits of a case.

A leading New York case developing fully principles of treaty construction and interpretation as to Warsaw is

Eck v. *United Arab Airlines* (1964) 15 NY2d 53, 255 NYS2d 249, 203 NE2d 640, 6 ALR3d 1260, where the court wrote (15 NYS2d at pp. 58-60, 255 NYS2d at pp. 251, 252, 6 ALR3d at pp. 1266, 1267):

"The crux of the problem is that the Appellate Division reached its conclusion by applying mechanically the *literal* translation of a phrase without an analysis of the treaty. The court overlooked the canon that, when a treaty is invoked, *what is to be applied are its principles if its purposes are to be observed presently as in the past.* (Valentine v United States ex rel., Neidecker, 299 US 5, 10, 57 S Ct 100, 81 L ed 5, 9 [1936]; Maximov v United States, 373 US 49, 54, 83 S Ct 1054, 10 L ed 2d 184, 188 [1963].) The reasoning which supports a strictly literal reading of the phrase might not have done violence to the overall scheme and design of the Convention under the conditions existing when the treaty was drafted. At that time[2] it would have been in harmony with the methods under which the carriers were operating and with the objectives of the Convention. (Strother v Lucas, 12 Pet [37 US] 410, 428, 9 L ed 1137, 1144 [1838].) Now, however, almost a half century later, when the carriers have radically changed their methods of booking passage, the whole scheme of the treaty in relation to international air travel makes it imperative to analyze this self-executing treaty in assigning meaning to any part of it. In doing this it must be recognized that the literal wording of one particularly applicable section of

[2] When the convention was originally drafted in 1926, Charles Lindbergh had not flown to Paris. When it was first adopted Air France had two overseas flights, one from Paris to London and the other from Marseilles to Tunis. Pan American flew from Key West to Havana. The China Clipper flight on Pan American did not take place until 1935, after the United States had become a signatory to the Warsaw Convention in 1934.

the entire treaty should not set the limits of our interpretive examination . (Choctaw Nation of Indians v United States, 318 US 423, 432, 63 S Ct 672, 87 L ed 877, 883 [1943].) The proper procedure now is to examine the treaty as a whole, along with its history, and, in particular to look into the problems which it was intended to solve.

This process displays the purposes underlying the treaty's adoption. The over-all principle of the Convention was one of allowing only a regulated burden to be the responsibility of the then struggling carriers. The purposes were to *provide uniform rules of limitation concerning the liability* of international air carriers to their passengers and to *provide a uniform remedy for these passengers* to the extent that this remedy would not burden the carrier more than the Convention provisions allowed. These principles were expected to be operative with respect to conditions developing after the enactment of the Convention. * * * *

Allowing this suit does not run contrary to the convention's provisions. Rather it gives a meaningful effect to the underlying principles by applying them to the realities of international air travel in these times. In 1926 these principles were put into a specific written formula which was meant to deal not only with the circumstanees of an infant industry in that era but also accomodate itself consistently to changing conditions as the industry grew."

On or about the last of December, 1967, the New York Court of Appeals decided the important case of *Egan* v. *Kollsman Instrument Co. and American Airlines, Inc.*, No. 584 on its Docket. The decision is so recent, at date of writing of this brief, that we are unable to furnish the citation in either NY2d Reports or in NYS2d. But because the

case involved the exact question now before this Court, we beg this Court's indulgence in quoting the opinion of Chief Judge Fuld for a unanimous New York Court, further noting that such unanimous Court deliberately followed the decision herein, in *Lisi*, of the two federal courts below *with full knowledge and mention of the fact that certiorari had been granted herein*, thus indicating the considered judgment of the New York Court that what the Second Circuit has held was correct:

> "This brings us to the plaintiffs' further argument that, even if the Warsaw Convention applies, the carrier is not entitled to invoke the provisions limiting its liability because the ticket delivered to Mrs. Seiter did not give sufficient notice that the rules of the Convention relating to the limitation of liability were applicable.
>
> Under article 3(1) (e) of the Convention, an airline is required to deliver a passenger ticket which contains a 'statement that the transportation is subject to the rules relating to liability established by this convention.[4] The ticket before us did contain, in footnotes

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[4] Article 3 provides:

'(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of

> transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.'

on the several coupons, such a statement (*supra*, pp. 1-2) but, as is apparent from inspection, it is in such exceedingly small and fine print as almost to defy reading..[5] Thus, although there was literal compliance

[5] One court has described the notice in this way (*Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F Supp 237, 243, affd. 370 F 2d 508):

> 'The footnotes printed in microscopic type at the bottom of the * * * coupons, as well as condition 2(a) camouflaged in Lilliputian print in a thicket of "Conditions of Contract" crowded on [the outside back cover], are both unnoticeable and unreadable.' Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed.'

with the prescription of article 3, the question arises whether such compliance satisfies the Convention's demands when viewed in the light of its overall purposes. We do not believe that it does. In our judgment, a statement which cannot reasonably be deciphered fails of its purpose and function of affording notice and may not be accepted as the sort of statement contemplated or required by the Convention.

In support of its argument to the contrary, the respondent points to *Ross* v. *Pan American Airways* (299 N.Y. 88, *supra*). The ticket there under consideration, not too unlike the one before us, had been delivered not to the passenger personally but to a third person who had been in charge of all arrangements up to the time of the plane's departure. In holding that delivery to the latter was sufficient, the court observed that, when a ticket provided for international transporta-

tion, the Convention applied 'by its own terms and not because the parties agreed' and that the carrier need show no more than delivery of the ticket (p. 97). As already indicated, the sole question presented concerned the adequacy of such delivery. No argument was made by the passenger as to the form of the ticket or the readability of the statement as to liability. And, indeed, in 1964, 15 years later, the court decided *Eck* v. *United Arab Airlines* (15 N.Y. 2d 53) and, despite the carrier's strong reliance on the rationale and language of *Ross,* expressly rejected a 'strictly literal reading' of the Convention or any of its provisions. Remarking the changes which had occurred in the years since the Convention had been drafted and stressing the vital canon of construction that, when a treaty is invoked, '*what is to be applied are its principles if its purposes are to be observed*' (emphasis in original), the court declared (p. 59):

> 'The reasoning which supports a strictly literal reading of the phrase might not have done violence to the over-all scheme and design of the Convention under the conditions existing when the treaty was drafted. At that time it would have been in harmony with the methods under which the carriers were operating and with the objectives of the Convention. [Case cited.] Now, however, almost a half century later, when the carriers have radically changed their methods of booking passage, the whole scheme of the treaty in relation to international air travel makes it imperative to analyze this self-executing treaty in assigning meaning to any part of it. In doing this it must be recognized that the literal wording of one particularly applicable section of the entire treaty should not set the limits of our interpretive examination.'

And, even more recently, the United States Court of Appeals for the Second Circuit, confronted with the precise problem now before us, decided that a ticket, containing a statement (as to the carrier's liability) virtually identical in content and form with that in this case, failed to give passengers the notice required by the Convention. (See *Lisi* v. *Alitalia-Linee Aeree Italiane*, 370 F 2d 508, cert. granted 36 USLW 3189.) After observing out that '[t]he Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier,' the court, in an opinion by Judge Kaufman, went on to say that 'the *quid pro quo* for the one-sided advantage is delivery to the passenger of a ticket * * * which give[s] him notice' of a 'very substantially' limited liability and affords him 'the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit' (pp. 512-513). Pointing out that the statement on the tickets under consideration was printed in such a manner as to be virtually unnoticeable and unreadable, the court concluded, as already noted, that the tickets did not give the passengers the required notice.

Other interpretations of article 3 have also taken into account the fact that a traveler today is likely to undertake international travel quite casually and without realizing the drastically limited protection they are receiving when compared to that provided by domestic flights. (See *Mertens* v. *Flying Tiger Lines, Inc.*, 341 F 2d 851 [2d Cir.]; *Warren* v. *Flying Tiger Lines, Inc.*, 352 F 2d 494 [9th Cir.]; but see *Seth* v. *BOAC*, 329 F 2d 302, 307 [1st Cir.].) In the *Mertens* case (341 F 2d 851, *supra*), the court read article 3 'to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to

take measures to protect himself against the limitation of liability' (p. 856) and held that the requirement was not met by reason of the fact, among others, that the ticket delivered was 'printed in such a manner as to virtually be both unnoticeable and unreadable' (p. 857). In addition, the Civil Aeronautics Board in 1963 adopted a regulation requiring (1) that the statement as to limitation of liability follow the far more clear and specific language specified by the Board; (2) that it 'be printed in type at least as large as ten point modern type [as contrasted with the 4½ point type in this case] and in ink contrasting with the stock'; and (3) that a similar statement be placed at all ticket counters in letters at least one-fourth of an inch high (14 Code Fed. Regs., § 221.175).[6]

[6] The language of the statement which was mandated by the CAB was similar to that provided for in the amendment to article 3 appearing in the so-called Hague Protocol to the Convention executed in 1955. (See 3 CCH Aviation L. Rep. ¶27,106.) This Protocol was never ratified by the Senate, apparently because its most significant feature, increasing the maximum liability to $16,000 was considered inadequate. It is of more than passing interest that in 1965 our Government in a Notice of Denunciation declared that it opposed the Convention's low limits on liability and indicated an intention to withdraw from the Convention unless an agreement were reached (among the world's international air carriers) to raise the limit to $75,000 and that in May of 1966 such an agreement was executed. (See 3 CCH Aviation L. Rep. ¶27,130; The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation, 32 J. Air L. & Com. 243.)

These decisions and regulations are suggestive of a national policy requiring that air carriers give passengers clear and conspicuous notice before they will be permitted to limit their liability for injuries caused by their negligence. An examination of the ticket forms which the respondent used, in the light of that policy, can only lead one to conclude that Mrs. Seiter was not sufficiently apprised of the consequences which

would result from the fact that her flight happened to carry her outside of the United States. Despite the fact that the Convention was applicable to her journey, the carrier's failure to give the requisite notice prevents it from asserting a limitation of liability. Accordingly, the plaintiff's motion to dismiss the third affirmative defense should have been granted."

As did the two courts below, the New York Court of Appeals held that *as a matter of law* a ticket of the type herein involved is insufficient to permit interposition by a carrier of a defense based upon Article 22 of Warsaw. The decisions of these three courts should completely dispose of petitioner Alitalia's somewhat collateral issue that a jury question was raised as to the "notice" in the *Lisi* tickets—an issue, by the way, that the Second Circuit held had been waived.

The rule that treaties are to be construed as a whole, with effect given to all their provisions if possible, with the provisions construed in pari materia, is supported by many decisions of this Court and those of other courts. See *Geofroy* v. *Riggs* (1890), 133 US 258, at p. 270, 33 L ed 642, at p. 646, 10 S Ct 295 ("It is a rule, in construing treaties as well as law, to give a sensible meaning to all their provisions if that be practicable"); *Sullivan* v. *Kidd* (1920) 254 US 433, at p. 439, 65 L ed 344, at p. 347, 41 S Ct 158 ("all parts of a treaty are to receive a reasonable construction, with a view to giving a fair operation to the whole. 5 Moore, International Law Dig. 249."); *Hamilton* v. *Erie R. Co.* (1916), 219 NY 343, at p. 353, 114 NE 399, writ of error dism in 248 US 369, 63 L ed 307, 39 S Ct 95 ("The entire provisions of the treaty relevant to the inquiry are to be studied");

52 Am Jur, TREATIES, § 28; 87 CJS, TREATIES, § 13a, p. 937, nn. 92, 93.

In *Sullivan* v. *Kidd, supra,* this Court construed the treaty between Great Britain and the United States of March 2, 1899, relating to the tenure and disposition of real and personal property, and, in order to reach a proper construction and application of Article IV thereof relating to the applicability of the treaty to the (then) Dominion of Canada, considered the significance of Article VI relating to termination by notice.

Similarly, in the instant case, the proper construction and application of Warsaw, Articles 3(1)(e) and 3(2), depend upon giving proper effect to such a cognate provision as the clause of Article 22(1) that "the carrier and the passenger may agree on a higher limit of liability." Now, unless an intending passenger were given notice in his ticket—in language that he could see, read and understand—that his flight was subject to the limits of liability stated in Article 22 of Warsaw but that he could make a contract with the carrier for a higher limit, how could the provision as to contract for a higher limit in any way be meaningful? The position taken by petitioner Alitalia and those *amici* supporting that position requires that the provision as to contract for higher limit be thrown out the window. Such a position is completely inconsistent with the rule that a treaty should so be construed as to give effect to every provision.

VII.

The Original Greek Proposal Relating to the Sanctions in Article 3 of Warsaw, Does Not Support Petitioner's Position, Since It Did Not Relate to Limitation of Liability and Would Not Have Eliminated the Sanctions.

In various briefs supporting the position herein of petitioner Alitalia, an attempt has been made to build a "legislative history" argument to the effect that a proposal-amendment submitted by the Hellenic (Greek) delegation before the 1929 Warsaw Conference took place, resulted in the deletion from Article 3(2) of a sanction for omission of particulars from the passenger ticket, from the final Warsaw draft. Although the exact proceedings are somewhat obscure in the minutes, it is clear from a reading of this Hellenic proposal that the above argument is unfounded. The Hellenic proposal, as shown below, did not relate to limitation of liability, and it would not have resulted in complete elimination of sanctions. Indeed, it appears that the dropping of sanction from Article 3(2) was accomplished without any discussion of the actual terms of the Hellenic proposal which is now cited as the basis for such elimination.

Without any reading or disclosure of the terms or details of the Hellenic-proposed amendment, it was stated that that proposal was as follows (Warsaw Minutes, page 101):

> "Mais en présence d'une observation de M. le Délégué hellénque, qui est la suivante: le dernier alinéa de l'article édicte les sanctions en cas d'absence de ce billet de passage, ou lorsque le billet de passage ne

contient pas toutes les mentions indiquées, dès lors la sanction est trop sévère lorsqu'il s'agit d'une simple omission, d'une négligence d'un employé de la compagnie de transports — la commission s'est ralliée à ce point de vue et, dans le dernier alinéa, elle a supprimé les mots:

„... ou si le bulletin ne contient pas les mentions indiquées ci-dessus'."

This may be translated:

"But in the face of an observation by the Hellenic Delegate, which reads as follows: The last paragraph of the article decrees the sanctions in case of absence of the passenger ticket, or when the passenger ticket does not carry all the particulars indicated, from then on the sanction is too harsh, when there is a simple omission, a negligence of an employee of the company of transport — the commission has agreed with this viewpoint, and in the last paragraph, it eliminated the words: or if the document does not contain the above particulars."

The "commission" may have "agreed"; but, as we show hereinafter, the above language goes much further than the Hellenic proposal. Then, after no one wanted the floor (Warsaw Minutes, page 130), the "commission's" Article 3 was voted on and adopted without any discussion at all. That is how Article 3(2), of Warsaw, as worded, slipped into the Warsaw Convention.

The original Hellenic (Greek) proposal is contained in Warsaw Minutes (page 196, 197):

REPUBLIQUE HELLENIC.

Article 3 — § 4.

"Conformément à l'article 22 du projet, dans le cas d'un accident, le transporteur peut dègager sa responsabilité s'il prouve que lui et ses préposès, ont pris les mesures raisonnables pour éviter le dommage, ou qu'il leur était impossible de les prendre.

Toutefois, d'après l'article 3, le transporteur pend cet avantage, si le billet de passage ne contient pas les mentions indiquées dans cet article.

Il se peut, en effet, que par une simple négligence le transporteur ait omis de mentionner dans le billet de passage le lieu de l'émission, ou le poine de départ, ou son nom et son adresse; ou mème qu'il conserve dans le billet son ancienne adresse, ou enfin qu'il ne signale pas un arrêt intermédiarie.

Ce sont là, en général, des omission sans grande importance pour la partie, parce qu' il est commu om facile à établir que le billet a été émis et le départ a eu lieu de l'aérodrome de telle ville, que l'avion appartient à telle compagnie, ou parce que l'arrêt intermédoaire peut être sans intérêt pour le contractant.

On peut se demander pourquoi une telle omission, sans importance pour la plupart des cas, devrait entrainer, dans tous les cas, une sanction aussi grave que celle prévue par l'article 3, paragraphe 4.

Si l'omission est sans intérêt pour l'autre partie et si elle ne lui cause aucun dommage, comment pourrait-on justifier cette sanction sévère à la charge du transporteur?

Cette sanction est justifiée seulement dans le cas où l'omission d'une mention aurait engendré un dommage

au passager, comme il peut arriver dans certaines circonstances.

Mais qui jugera s'il y a dommage à cause de cette omission à l'autre contractant, et si ce dommage est tel qu'il faut faire perdre au transporteur la facilité de sa dégager par la preuve qu'il a fait le nécessaire pour éviter l'accident? Il n'y a certes que le tribunal, saisi de l'affaire, qui pourra faire cette appréciation.

C'est pour ces raisons que nous proposons de modifier l'alinéa 4 de l'article 3 du projet comme suit:

„Si, pour un tranport international, le transporteur accepte le voyageur sans qu'il ait établi un billet de passage, le contrat de transport n'en sera pas moins soumis aux régles de la présente convention, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent en tout on en partie sa responsabilité directe ou dérivée des fautes de ses préposés.

„Si le billet de passage me contient pas une des mentions indiquées ci-dessus, le transporteur sera privé de ce droit dans le cas, où, d'après l'appréciation du tribunal, un dommage serait causé de ce fait à l'autre partie".

Pour les mêmes raisons il faudrait modified dans le mêmes sens l'alinéa 7 de l'article 4 pour le bulletin de bagages et l'article 17 pour la lettre du transport.

A fair translation ensues:

Hellenic Republic

Article 3 — Section 4

"In conformity with article 22 of the draft, in case of an accident, the carrier can set aside his liability if he proves that he and his agents have taken reasonable

measures to avoid the damage, or that it was impossible for them to take any.

However, according to article 3, the carrier loses this advantage if the passenger ticket does not contain the particulars indicated in this article.

It may happen, in fact, that due to a simple neglect, the carrier has omitted to mention in the passenger ticket the place of issue, or the point of departure or his name and address; or even that he keeps on the ticket his old address, or, finally that he does not point out an intermediate stopping-place.

These are, generally, omissions of no great importance for the most part, because it is known, or easy to establish where the ticket was issued and that departure took place at the aerodrome of such town, that the plane belongs to such company, or that the stopping place may be of no interest to the contracting party.

One may ask why such an omission, of no importance in most cases, should entail, in all cases, such a serious sanction as that provided by Article 3, paragraph 4.

If the omission is of no interest to the other party and causes no damage, how can this severe sanction of the carrier be justified?

This sanction is only justified in case the omission of a particular would have caused a damage to the passenger, as it may happen under certain circumstances.

But who shall judge if there is damage, because of this omission, to the other contracting party, and if this damage is such that the carrier must lose his possibility of clearing himself by proving that he has done everything possible to avoid the accident?

Certainly it shall only be the court before which the case is brought which shall be able to give an appreciation.

For these reasons, we propose to change paragraph 4 of article 3 of the draft as follows:

'If, for an international transportation, the carrier accepts the passenger without a passenger ticket having been established, the contract of transportation shall nevertheless be subject to the terms of this Convention, but the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude all or part of his liability, direct or derived from the faults of his agents.

If the passenger ticket does not bear one of the above mentioned particulars, the carrier shall be deprived of this right, in case, according to the appreciation of the court, a damage has therefore been caused to the other party."

For the same reasons, paragraph 7 of article 17 should be changed along those lines for the baggage check and article 17 for the waybill'.

Two important facts emerge from a careful reading of this original Hellenic proposal, neither of which lend any support to the position of petitioner Alitalia. In the first place, the proposal is concerned with the complete loss of a valid legal defense to liability, for failure to include certain particulars in a passenger ticket. This goes far beyond loss of an arbitrary limitation on liability, which the Greek proposal does not even mention. The Hellenic concern was with a carrier's loss of a defense even though such carrier might be able to sustain the heavy burden of proving that it had done everything possible to avoid an accident. This Greek fear of loss of such a valid defense

was somehow colored into a purported elimination of a sanction precluding mere limitation upon liability.

In the second place, the Hellenic proposal did not seek to eliminate the sanction altogether, but would have allowed a sanction where the court found damage to a passenger caused by omission of particulars in the ticket. Presumably, this would cover a situation where a passenger failed to purchase flight insurance because of lack of notice of liability limitation—the very basic policy underlying the decision in the *Lisi* case below.

This argument submitted by petitioner points up one of the basic vices of Warsaw: the attempt to regulate private legal rights of passengers and carriers by an international treaty. Since the United States did not even participate in drafting of the treaty, its origins and true drafting history are even more obscure than would normally be the case. For further striking illustrations of this situation, see the attempt of the Fifth Circuit panel to divine the drafting history of Warsaw in *Block et al.* v. *Compagnie Nationale Air France* (Nov. 8, 1967) ——F 2d——, 1967 CCH Neg Cases, p. 2307.

CONCLUSION

The decision and judgments below should be affirmed.
Dated: January 18, 1968

Respectfully submitted,

STUART M. SPEISER
Counsel for amicus curiae
Arnold Holtzman
200 Park Avenue
New York, N. Y. 10017

CHARLES F. KRAUSE
ALFRED W. GANS
DONALD W. MADOLE
SPEISER, SHUMATE, GEOGHAN & KRAUSE
Of Counsel

Certificate of Service

I hereby certify that copies of this brief *amicus curiae* have been served by first class mail on the 18th day of January, 1968, upon:

AUSTIN P. MAGNER, Esquire
GEORGE N. TOMPKINS, JR., Esquire
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

THEODORE E. WOLCOTT, Esquire
Attorney for Respondents
36 West 44th Street
New York, New York 10036

HAROLD L. WARNER, JR., Esquire
Attorney for International Air Transport Association
25 Broadway
New York, New York 10004

JOHN E. STEPHEN, Esquire
JOSEPH F. HEALY, JR., Esquire
Attorneys for Air Transport Association of America
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

THE SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20630

ALFRED C. CLAPP
Counsel for the Republic of Italy
44 Broad Street
Newark, N. J.

EDWIN LONGCOPE, Esquire
Attorney for the United Kingdom of Great Britain and Northern Ireland
26 Broadway
New York, New York 10004

ROBERT MACCRATE, Esquire
Counsel for Canada
48 Wall Street
New York, New York 10005

STUART M. SPEISER
Counsel for Arnold Holtzman
200 Park Avenue
New York, New York 10017

APPENDIX A

NACCA BAR ASSOCIATION
National Association of Claimants' Compensation Attorneys
OFFICE OF THE NACCA AVIATION LAW SECTION

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HOME OFFICE:
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Please address reply to:
STUART M. SPEISER, CHAIRMAN
NACCA AVIATION LAW SECTION
290 MADISON AVENUE
NEW YORK 17, N.Y.

September 27, 1962

Hon. Alan Boyd
Chairman, Civil Aeronautics Board
Washington 25, D. C.

Re: I.G.I.A. Report on Warsaw Convention and Hague Protocol

Dear Mr. Boyd:

We have received the report of the Interagency Group on International Aviation (IGIA) dated August 7, 1962, relating to the Warsaw Convention and the Hague Protocol. We are preparing a detailed analysis of this report which will be ready shortly. There is one phase of the report which appears to call for immediate action by the Civil Aeronautics Board, and so I am addressing this letter to you at this time. Copies are being sent to other members of IGIA, members of Congress and other interested government agencies.

One of the recommendations of IGIA is that air carriers be required to give "clear and positive notice of the limita-

tion of liability article (Article 22) of the Warsaw Convention. . . ." This is apparently the only unanimous recmomendation of all agencies concerned; for even the Department of Commerce (the only agency which gave unqualified approval to the Hague Protocol) is on record as favoring a "greatly strengthened regulation" to notify passengers of the liability limitations, and "easy access to purchase additional trip insurance".

Accordingly, it is clear that all the government agencies concerned (including the C.A.B., F.A.A. and Department of Justice) have reached the conclusion that the present language contained in air carrier tickets does *not* give adequate notice of the limitations of liability. The IGIA report concerns itself partially with a proposed future scheme which would raise the amount recoverable by international passengers from the present $8,300 to approximately $66,000; and even with this substantially higher amount, the IGIA concludes that "clear and positive notice" must be given to passengers, so that they can decide whether to buy insurance of their own. Therefore, it is patent that under the present day limitation of only $8,300, such "clear and positive notice" of the limitation is even more vitally needed by the passengers—it is *eight times* as critical today, when you reduce it to mathematics. This point was covered aptly by Senator Homer E. Capehart in his comments on the Warsaw Convention on November 10, 1961, addressed to IGIA (Attachment 61 to IGIA 23/1.3): "This is the most unconscionable provision in all our history ever to affect adversely all American citizens. There is absolutely no need for a provision of this nature, and the felony is compounded in that less than one-half of one percent of the passengers in international traffic are even aware of it."

Appendix A

Therefore, we assume that the Civil Aeronautics Board is already concerning itself with the matter of "clear and positive notice" to passengers, independant of any action on the IGIA recommendations, since this is a matter in which the traveling public needs the *immediate* protection of the C.A.B. Undoubtedly, many passengers have been killed without having had the opportunity to provide security for their families, when notice of the Warsaw limitation would have caused them to buy extra insurance for a very few dollars.

It also appears that this is a matter which the C.A.B could accomplish by administrative regulation, without the necessity for special legislation. Certainly, the Federal Aviation Act confers on the C.A.B. the power to prescribe regulations which are so basic to the protection of the public. I note that the C.A.B. has already promulgated regulations [14 C.F.R. §221.38(h)] relating to personal liability rules in air carrier tariffs.

The IGIA quite properly restricted its report to basic statements of principle; they did not spell out the form of the proposed "clear and positive notice". You of the Civil Aeronautics Board, and we of the NACCA Bar Association, must concern ourselves with this important detail —just what forms of notice must be given? Eventually, the courts will decide what is "clear and positive notice" of the Convention, through which air carriers seek to limit their liability and invoke foreign law in place of American law. In my opinion, the courts will invoke the strictest available rules of construction in deciding whether the carriers have given "clear and positive notice" to a deceased airline passenger.

The IGIA report states that the passenger "should be positively advised, when he buys his ticket or when he

checks in, of the exact amount of the carrier's limitation of liability . . . ." This is merely a general statement of the need for notice; it does not spell out the manner of assuring that such notice is given.

As a practical matter, notice of liability limits given when the passenger is checking in would *not* be adequate to accomplish the required purposes. Many passengers check in too late to buy additional trip insurance; there may be a long line at the insurance counter and just a few minutes to catch the plane. Many passengers check in at places where there is an inadequate amount of insurance available, or none at all. I believe that the amount of flight insurance available at different terminals around the country varies from about $75,000 to $225,000. Furthermore, the purchase of insurance is often a matter for careful family discussion and planning, sometimes in conjunction with an insurance broker and an attorney. The purchase of trip insurance at an airport requires the passenger to make the insurance proceeds part of his taxable estate; there is no opportunity for assignment of the policy. On the other hand, a policy of the same size purchased before the trip through the passenger's insurance broker, might be assigned in such a way that the proceeds would not be taxable as part of the passenger's estate. This can make a tremendous difference in the amount actually realized by the passenger's family upon his death. This is just one of the reasons why the purchase of substantial amounts of insurance is a matter for careful planning, which is impossible if the passenger is not alerted to the need for insurance before the time of checking in for an international flight.

Likewise, notice at the time of purchase of the ticket would not be adequate. Many passengers do not pick up

their tickets until they reach the airport. Many tickets are picked up by secretaries or other employees, and are not seen by the passenger until shortly before the flight departs. Many tickets are written or delivered by travel agents who are beyond the control of air carriers, from the standpoint of assuring notice. In fact, I believe that the majority of overseas flights originating in this country are booked by travel agents. The pattern of ticket purchase and delivery is obviously too varied and uncertain to form the basis for the giving of "clear and positive notice" of liability limitations.

Furthermore, any system of notice based upon oral advice by clerical employees would obviously be unsatisfactory. In effect, all clerical employees of all the airlines in the U.S.A. would have to decide legal questions on all tickets containing foreign destinations. They would first have to decide whether particular nations are signatories to the Warsaw Convention, the Hague Protocol and possibly other Protocols or statutes relating to the new form of insurance proposed by IGIA. They would then have to advise the passenger of the "exact amount of the carrier's limitation of liability" (to quote the IGIA report). They might then be called upon to explain the cost and details of trip insurance. Aside from the delays which this would cause at ticketing and check-in counters, it is obviously not a system which could be relied upon to give actual notice to all prospective victims of limited liability.

I stated that *all* clerical employees of *all* the airlines in the U.S.A. would be involved, because it is possible for any one of them to sell a ticket for passage covered by the Warsaw Convention. The agent of Frontier Airlines at Riverton, Wyoming may today sell a ticket from Riverton

to Denver to Mexico City and return, which passage would be covered by the Warsaw Convention. Aside from the fact that there is no flight insurance available at the Riverton airport, it would be quite a burden on Frontier Airlines to require their already-busy agent to learn the intricacies of the Warsaw Convention.

Accordingly, we believe that careful study of the problem of "clear and positive notice" will lead the C.A.B. to the conclusion that such notice would have to be given to the passenger at the earliest indication of his interest in a trip involving international carriage. This is the only way in which the passenger can be assured an adequate opportunity to consider his insurance needs and to properly provide for them. Furthermore, we believe that such notice would have to be given in printed form, rather than by oral statements of clerical employees. In order to provide each international passenger with adequate notice, we believe that a written statement of the exact amount of limitation of liability would have to appear in:

1. All advertisements and promotional material issued by airlines and travel agencies for flights involving international carriage;

2. All check-in counters, ticket offices and ticketing stations of all air carriers in the U.S.A. (including travel agencies), in the form of a large wall sign or large counter card;

3. All tickets issued by all air carriers in the U.S.A. involving international carriage, in the form of a conspicuous overprint, in larger type than the present conditions of carriage.

Appendix A

The above is probably only a minimum starting point; no doubt the C.A.B. staff will think of other important points where notice should be given. However, examination of the above three categories makes it clear that any one of them may be the last point at which the passenger would have an adequate opportunity to act on the notice by providing for his insurance needs.

No doubt many air carriers would consider such requirements onerous. However, any burden brought about by giving such notice stems directly from the offensive nature of the Warsaw Convention itself. The carriers seeking special protection of foreign law in their dealings with American citizens must be prepared to pay the price of public condemnation. Heretofore, the carriers have been able to gain this special privilege without letting the public know about it, but the IGIA report makes it clear that responsible government officials will no longer tolerate the thrusting of such an "unconscionable provision" upon the American people, to use the language of Senator Capehart.

Now that the carriers are faced with a "clear and positive notice" requirement, I believe that their attitude toward the Warsaw Convention may undergo a change. It seems apparent that the giving of "clear and positive notice" to their public would have some adverse effects on their sales programs, particularly those aimed at the 75% of the American population who have never flown. It certainly would not help their sales efforts if they are required to communicate with each passenger about the possibility of accidents, the limitations of liability and the desirability of taking out special insurance. Neither the NACCA Bar Association, nor any other responsible organization desires any unreasonable financial burdens to be

added to our air transportation industry. Instead, we believe that the time has come for the carriers to realize that they will actually save money by denouncing the Warsaw Convention and thereby relieve themselves of the necessity for giving "clear and positive notice" of liability limitation. As pointed out in the IGIA report, if the carriers are saving anything in insurance premiums through the Warsaw Convention, it is a matter of pennies (7¢ on a New York-Los-Angeles flight, and 62¢ on a New York-London flight). It appears that it will cost them much more than this to give their passengers "clear and positive notice" of the limitations, to say nothing of the added cost of the extra insurance scheme proposed by IGIA as a condition of continued adherence to Warsaw and Hague. Therefore, at the moment when the air carriers become convinced that they will have to give "clear and positive notice", on economic grounds alone (without even considering public relations) it should become apparent to them that the Warsaw Convention honeymoon is over and that the time has come to operate on the same basis as the domestic carrier—the American system of equal justice for all under the law.

Therefore, we see in this task of framing the regulations for "clear and positive notice", an opportunity for the C.A.B. to solve the entire problem of the Warsaw Convention. If you, Mr. Boyd, make it clear to the airlines *now* that you intend to enforce the IGIA decision by requiring "clear and positive notice" of Warsaw, Hague or any other limitations, I believe that you will find the airlines ready to drop their insistence on the limitations. Through a notice of proposed rule-making, or other appropriate device, it should be possible to obtain the views of the airlines on this matter.

Appendix A

If the airlines are not ready to drop the limitation, then at least the traveling public will secure the greatest possible protection under the existing limitations of the Warsaw Convention.

This matter is as urgent and imminent as the next plane to leave from Idlewild, loaded with American citizens who have never heard of the Warsaw Convention. It is much more urgent than further deliberations on the Hague Protocol and supplementary insurance legislation, for the Hague Protocol requires further action by a number of countries other than the United States before it can become effective. "Clear and positive notice" can avoid disaster and suffering *today.* Furthermore, it is most practical to approach the whole Warsaw Convention problem on the basis of what the airlines will actually do in the face of any changes, because in the final analysis, the airlines have the power under Article 22 of Warsaw and Hague to vary whatever terms might be imposed upon them. Accordingly, I respectfully request the privilege of an early appointment in Washington with you or the member of your staff in charge of this matter.

Sincerely yours,

/s/ STUART M. SPEISER
STUART M. SPEISER, Chairman
NACCA Aviation Law Section

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